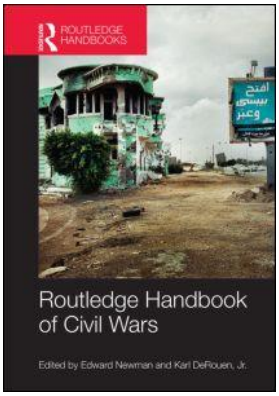

Routledge Handbook of Civil Wars

Edward Newman, Karl DeRouen

International Humanitarian Law in Civil War

Publication details
https://www.routledgehandbooks.com/doi/10.4324/9780203105962.ch26
Emily Hencken Ritter
Published online on: 18 Feb 2014

26

INTERNATIONAL HUMANITARIAN LAW IN CIVIL WAR

Emily Hencken Ritter

In 1864 Henri Dunant became the father of international humanitarian law (IHL), which governs the treatment of persons who are not, or are no longer, participating in warfare, protecting them from the harmful effects of armed conflict. The Geneva Conventions and related treaties developed over the next century establish rules to protect prisoners of war, medical personnel, the wounded, civilians, and refugees from being targeted in the context of armed conflict, as well as limiting methods and means of warfare such as landmines and cluster munitions so that casualties to these vulnerable parties are minimized. While some forms of international law establish major institutions or include mechanisms of enforcement, the treaties that form the foundation of IHL are more like international human rights treaties (IHRTs): codified standards of acceptable behavior to which states agree to be bound *without* explicit enforcement mechanisms. Yet unlike IHRTs, violations of IHL in interstate conflict directly impact members of other states, so that states are incentivized to enforce, support, and comply with IHL on a regular basis. In other words, concerns of reciprocity in large part keep states from violating the laws of war.

IHL also applies to "non-international armed conflict" or civil war, but the nature of civil war undermines the enforceability of the rules that tend to constrain states in international conflict.[1] Civil conflicts are fought within the territory of a single state, either between the state and one or more non-state organized armed groups, or between non-state armed groups. When the state is a contracting party to the Geneva Conventions, all of the parties to the conflict are obligated to comply with their terms, even those parties that are not state-authorized entities. Yet non-state parties can easily violate these terms as a result of ignorance – armed rebel forces frequently are unaware of their obligations under international law, as they are not government forces, and they often lack identifying traits that would distinguish them as being legal combatants as opposed to civilians, blurring the lines between those involved in and those outside of the legal conflict. Furthermore, the non-permanent nature of non-state parties to an internal conflict and the sovereignty of state actors prevent the mechanism of reciprocity from motivating forward-looking compliance with the law.

This chapter presents a summary of prevailing legal and social science scholarship on the application of IHL to the context of civil war. After a brief description of the obligations states have to IHL in international conflict, I identify the differences and the difficulties of applying these international obligations to non-state parties engaged in conflict and even states parties

faced with short-term incentives to violate their obligations. There are far fewer explicit obligations that govern conduct in civil wars, and these are largely unknown to those actors who must self-police, which makes the starting point of enforcement – the *prevention* of violations – difficult. The primary mechanism by which compliance with IHL is enforced in international conflict – the threat of reciprocal violations that would impact one's own forces in the future – does not hold much sway in internal conflicts, which have explicit incentives to target those outside of the main parties and are short term in nature. IHL thus relies on new international institutions like the International Criminal Court to prosecute and deter major war crimes that would occur in civil wars – which also suffer from enforcement problems in their institutional infancy. Using extant scholarship to support my arguments, I argue that the nature of civil war undermines the efficient application, and thus practice, of international humanitarian obligations in non-international armed conflict.

The basics of international humanitarian law

IHL is a set of formal treaties and customary laws that establishes rules to limit the effects of armed conflict on vulnerable persons. Dunant's original ideas for IHL developed in response to the treatment of the wounded in a battle in Solferino, Italy, but over time they were easily extended to cover many other categories of vulnerable persons often affected by war. This section details the basic tenets of IHL: the obligations, the protected persons, and the enforcement of the laws of war in general contexts, before turning to its application to civil wars in the next section.

Over 100 treaties include standards related to the conduct of armed conflict, but the core of IHL is codified in the four conventions known collectively as the Geneva Conventions and their associated Protocols. Nearly every state in the international system (194 states as of January 2013) is a contracting party to the Geneva Conventions that form the basis of IHL and thus legally bound to their terms.[2] Each convention protects a different group of vulnerable persons during war and outlines the obligations of states parties to protect these persons. The major tenets of IHL include, but are by no means limited to, the following obligations:[3]

- Members of combat forces who have laid down their arms or are classified as *hors de combat*[4] because of sickness or injury are to be treated humanely, including basic medical care, food, and shelter (Convention I).
- Medical and religious personnel cannot be targeted in combat. Further, hospitals, ambulances, or any other fixed or mobile medical unit should not be attacked and should be whenever possible situated to keep them out of harm's way. Staff of the National or International Red Cross Societies are to be given the same protection, and the symbol of the Red Cross (as well as the Red Crescent and Red Crystal) is to be treated as a neutral symbol (Convention I and Protocol III).
- The principles of protection for the wounded, sick, and prisoners of war (POWs) apply equally to maritime warfare (Convention II) and those fighting in air combat (Protocol I).
- Prisoners of war are to be treated humanely while in custody. Their capture is to be reported so that their families might know their whereabouts, and torture, violence, or humiliating treatment is forbidden. POWs should not be executed without trial by a regularly constituted court (Convention III).
- States parties are prohibited from targeting civilians for physical suffering or extermination. Wounded, sick, elderly, children, and pregnant women are to be given particular attention when it comes to protection (Convention IV).
- Children orphaned by conflict must be cared for by the state (Convention IV).

- Women are particularly vulnerable during conflict, and should be protected from physical abuse, especially rape (Convention IV).
- Articles 44, 45, 49, and 70 of Convention IV apply to those displaced by conflict or refugees, and the obligations related to refugees are extended in the 1951 Convention on the Status of Refugees, such that anyone with a legitimate fear of persecution in their state of origin must be granted asylum.
- Additional Protocols I and II extended the terms of the Geneva Conventions to be applicable to conflicts for independence from colonial rule and civil wars (called non-international armed conflicts).
- A number of additional treaties, such the 1899 and 1907 Hague Regulations, the 1972 Biological Weapons Convention, and the 1993 Chemical Weapons Convention, for instance, limit the use of weapons and methods of warfare, the effects of which are difficult to restrict to those classified as combatants.

Beyond the major ideas laid out in the Geneva Conventions and considered central to IHL, many other treaties and legal obligations include restrictions on the conduct of war. The Convention for the Rights of the Child, for example, includes articles obligating states to honor IHL that is relevant to children and determining the minimum legal age at which a person may take part in hostilities (Convention on the Rights of the Child, Article 38). Furthermore, there are obligations to protect vulnerable actors in warfare that are not written in treaties but considered customary law, or "a general practice accepted as law"[5] – which is thus applicable even to non-signatories. For instance, the Geneva Conventions do not mention peacekeeping missions, yet it is considered customary international humanitarian law to treat members of peacekeeping missions as civilian or otherwise neutral parties, much like parties would treat Red Cross personnel (Henckaerts 2005: 192). In short, IHL represents a vast and varied set of regulations to protect those made most vulnerable by war.

As a recent report on customary IHL notes, problems of compliance with IHL is not due to inadequacy of the obligations or of the efforts to enforce them internationally. The International Committee of the Red Cross (ICRC) is charged with the promotion and monitoring of IHL and its application in armed conflicts of all types. The ICRC has staff on the ground of most conflicts, is available to aid in interpretations of the law, initiates and supports research on the application and practice of IHL, monitors compliance worldwide, etc. In other words, the rules are clear, and there are international, neutral efforts to support states in compliance.

Rather, states violate these rules when they lack the capacity to enforce them or because they are unwilling to enforce them on their own agents (Henckaerts 2005: 176). An additional hurdle exists even when states have clear understandings of IHL requirements because those making policies or executing commands in the field are significantly less likely to be informed of the rules of protection of civilians, wounded, and other vulnerable populations. This gap in understanding is amplified in civil conflicts, since humanitarian law is significantly less codified and clear in non-international armed conflicts.

International humanitarian law in non-international armed conflict

The distinction between international armed conflict and non-international armed conflict determines which international humanitarian laws apply to the relevant parties. In interstate war, the parties to the conflict are organized forces that are commanded by states, which are clearly obligated to the Geneva Conventions and the other tenets of customary IHL. In civil wars, by contrast, at least one party to the conflict is a non-state armed group. Such groups are

not only less privy to the obligations of international law and their interpretations but the obligations themselves are less clear when it comes to non-state groups specifically and civil wars generally. This section lays out a brief synopsis of codified IHL as relevant to civil conflict.

Just as political scientists struggle with the classification of civil war, so do humanitarian legal scholars and the ICRC. The existence of organized armed conflict invokes the relevance and requirements of IHL, even when involved groups are non-state actors. Put differently, because the state is obligated, all actors within the state are bound to respect the edicts of IHL. Internal conflicts are considered armed conflicts relevant to the application of IHL when the conflicting parties are organized and the conflict reaches a minimum level of intensity (Vité 2009: 76). Civil war scholars have similar criteria as to what constitutes a conflict, with some scholars arguing that it becomes armed conflict when twenty-five people have died in combat and others maintaining a higher threshold of 1,000 total deaths (Hegre and Sambanis 2006). The IHL distinction is not connected to deaths, but interactive requirements, and deaths can be used toward this categorization.[6] As Vité (2009: 76) points out, the threshold of intensity that defines non-international armed conflicts as legal combat is actually higher than the minimum that determines an international war according to IHL, since internal wars must be distinguished from other internal violence such as riots or repression. In practice, the ICRC determines the legal status of civil wars on a case-by-case basis.[7]

Though a great deal of legal ink is spilled determining whether a situation is an armed conflict and what type of conflict it is, it has also been argued that this distinction is not a critical one. In a landmark case tried in the International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor* v. *Duško Tadić* (*Jurisdiction of the Tribunal*),[8] it was determined on appeal that conflict can be defined as international *and* internal conflict. Judges also responded to the common assertion that international conflict dominates any other ongoing form of conflict in a state. Effectively, this case moved legal and political actors away from the idea that that the differences between these types of conflict are important when it comes to the criminal prosecution of war crimes (Greenwood 1996).[9]

Nevertheless, there are some IHL obligations that explicitly apply to non-international armed conflicts. The conflicting parties in an internal conflict are required to comply, at a minimum, with the terms set out in Article 3 common to the Geneva Conventions (called such because it is identical across all four conventions) and rules of customary IHL. This article calls upon all parties to the conflict to treat all persons not taking part in or no longer taking part in conflict to be treated humanely without discrimination. Specifically, the armed groups are not to use violence on such persons *hors de combat*, to take them as hostages, to submit them to degrading or humiliating treatment, or to pass sentence on them without judicial review. Combatants are to care for the wounded, and the ICRC should be allowed to offer its services to those protected by IHL.

Additional Protocol II to the Geneva Conventions, which entered into force in 1977, extends the list of obligations with which state and non-state armed parties in a non-international armed conflict must comply, but unlike the Conventions, Protocol II is not universally ratified; 166 states have ratified this protocol, with notable exceptions including India, Mexico, Pakistan, Somalia, Thailand, and the United States.[10] The protocol has a slightly different definition of internal conflicts than Article 3 common, in that its terms are applicable when the conflict is between state armed forces and non-state groups – conflicts between two or more non-state groups within a single state are not considered armed conflicts to which the terms of this protocol apply. The protocol includes a great number of obligations for those involved in non-international armed conflicts, including the normal categories of wounded, sick, and those *hors de combat*, but it is particularly important for the protection of civilians, who are so frequently

and horribly affected by civil wars on their territory. States parties are prohibited from attacking civilian targets, from attacking targets indiscriminately, and should do whatever possible to avoid civilian casualties. Combatants must not pose as civilians, so as to make the legal status of each entity distinguishable and to protect civilians from being targeted along with legitimate military targets. The terms of the additional protocol also protect the civilian environment, such that attacks should be proportionate and limited whenever civilians are at risk, and buildings or infrastructure that are indispensible to the civilian community must not be destroyed. These obligations are critical rules, and though not all states have ratified the protocol, the vast majority of states have, and most of these rules are also part of customary IHL and common practice.

There are many fewer obligations in IHL or even customary IHL that apply to civil wars than international ones. For instance, combatants cannot hold prisoner of war (POW) status in civil wars. The third Geneva Convention lists the protections available for POWs, including that they cannot be prosecuted for things that are legal under combat rules, such as attacking the enemy. In a civil war, a person who is taken prisoner can be tried by the state for treason or any other crime relevant to their attack on state forces.[11] Furthermore, over 100 treaties include terms that concern the legal conduct of international armed conflict, but there are far fewer treaties that include terms relevant to civil wars. As Henckaerts (2005: 178) writes,

> Only a limited number of treaties apply to noninternational armed conflicts, namely the Convention on Certain Conventional Weapons as amended, the Statute of the International Criminal Court, the Ottawa Convention on the Prohibition of Anti-personnel Mines, the Chemical Weapons Convention, the Hague Convention for the Protection of Cultural Property and its Second Protocol and, as already mentioned, Additional Protocol II and Article 3 common to the four Geneva Conventions.

In other words, some of the most fundamental difficulties of applying IHL in civil wars are the lack of regulations and the difficulty of identifying when they should be applied, let alone how to enforce the obligations.

Implementation and enforcement of international humanitarian law in civil conflict

As with most forms of international law, the bulk of ensuring compliance with IHL in civil war is in *prevention*. It is part of the central mandate of the ICRC to educate people about the tenets of humanitarian law so that they will be more likely to respect it. States and international organizations interested in protecting those not involved or no longer involved in armed conflict can go a long way to spread knowledge about IHL obligations. Information about combatants' obligations to only engage with legal combatants and care for the wounded in battle, for instance, can be disseminated in training. Military and political leaders can initiate programs that ensure that combatants know and understand the requirements of IHL. The ICRC also recommends that states appoint legal advisors to commanders of armed forces, and states are encouraged to set up their own monitoring procedures and open their borders to the ICRC for monitoring (ICRC 2004: 30). In Sierra Leone, for instance, the ICRC conducted a number of training sessions to educate members of the Sierra Leone Army as to their obligations to protect vulnerable persons in both international and non-international conflict.[12] It is notable that the states that have consented to a significant ICRC presence within their borders are those that open themselves to implementation of standardized programs of prison reform, training of civil servants, etc.[13]

Unfortunately, these are recommended measures that are unlikely to reach most combatants in the non-state groups involved in civil conflict. For the obligations of IHL to be carried out by these groups, rebel combatants must also know that they are obliged to collect and care for the wounded, to avoid civilian targets, etc. The leaders of non-state groups must know that IHL still applies to them even given their non-state status, and the leaders must convey these obligations to those carrying out orders in the field. Since non-state or rebel groups rarely have legal advisors or connections to other states which might inform them of these obligations, there is a significant gap between what non-state armed groups are legally bound to do and what they recognize and concede they should do.

Furthermore, there are tactical incentives to explicitly target civilian or other protected populations in civil war, which directly undermine the protections they are supposed to enjoy under IHL. Refugee camps, for instance, can provide unintentional harbor for rebels who can retool before attacking the state (Salehyan 2007), which puts this otherwise legally protected group of vulnerable persons at risk of becoming a military target. Rebel soldiers frequently seek shelter and provisions among civilian populations, making them difficult to distinguish so that one group might be targeted in conflict and the other protected (Valentino *et al.* 2004). Civilians are a potentially rich source of soldiers, protection, and resources, which leaves them at risk for coercion for purposes of recruitment (Humphreys and Weinstein 2008) and for purposes of deterrence. Kalyvas (1999) argues, for instance, that targeting civilians for mass killings can give a tactical advantage to a state or rebel group in civil war, because other civilians will be too afraid of punishment to lend their support to the group's opponent. These types of incentives turn civilians into a valuable entity to both state and non-state groups involved in internal conflicts; in other words, not only do these groups likely lack knowledge of their obligations to protect civilians under IHL, but they also lack the will to protect them and often seek to target them, directly undermining the edicts of the Geneva Conventions.

Warring entities could still comply with IHL, even given these incentives, if the idea of reciprocity could prevail. Reprisals can lead to the cessation of IHL violations, and they are even allowed within strict limits under the Geneva Conventions (Fleck *et al.* 2000: 528). Cassese (2001: 341) notes in his discussion of the law of armed conflict that "reprisals constitute the most rudimentary and widespread means of inducing the adversary to abide by the law." Morrow (2007) argues that states tend to comply with IHL in interstate conflict because, once they have agreed to a common standard of treatment for the wounded, civilians, POWs, etc., there is the threat of recourse to violations if one's opponent violates their obligations to protect. Because violations affect a state's opponent's advantage and have consequences for the state's own forces and civilians, there are strong incentives to stand by reciprocal violations as a means of enforcement (Morrow 2007). The consequences of violating IHL similarly affect one's prospects in conflict in a civil war, which suggests reciprocity as a possible way of enforcing IHL. However, the short-term prospects of the warring groups may undermine any long-term gains one would see from a reciprocal form of enforcement. If the state does not expect to face this rebel group again in the future, assuming its defeat, why protect wounded rebel soldiers from harm? Similarly, a rebel group may believe victory will lead to the elimination of the state's forces, so why should they be protected? More may be gained in the short term if the opponents do not see one another as lasting entities with reputations to preserve in the context of IHL.

Like protection from torture (cf. Conrad and Moore 2010), then, the implementation of IHL in armed combat could be considered a perverse principal–agent problem. Even if leaders, commanders, or policy-makers have stated preferences to obey IHL in the course of conflict, those actors on the ground whose direct goals are to emerge victorious have little incentive to protect people outside of their conflict purview. Indeed, as just discussed, there are significant

incentives *not* to protect civilians and even to target them in the context of civil wars. Thus, if IHL is to be protected in civil wars, there must be systems in place that can override these incentives or, more likely, threaten and actualize enforcement of the rules when there have been violations.

The prosecution of war crimes in civil conflicts

The promise of war crimes prosecutions, lies primarily with domestic courts. Contracting parties are required to incorporate the tenets of the Geneva Conventions into their national legislation, so that courts may adjudicate cases of violations based on these terms. States comply with this international mandate frequently, and the ICRC maintains a database detailing the institutions, legislation, and case law that incorporate IHL into domestic legal obligations.[14] Once incorporated into domestic law, states are then obliged to investigate and prosecute "grave breaches" of IHL over which they have domestic legal jurisdiction.[15] Violators of IHL in civil wars should in theory be easier to punish than violators in interstate conflict. Contracting parties are required to prosecute those who violate the terms of the Geneva Conventions (i.e. those who commit war crimes) in domestic judicial proceedings, and internal war criminals can in most cases be found entirely within the jurisdiction of a single state, reducing difficulties of capturing suspects. While states may still be resistant to trying their own soldiers for violations, they will usually have no qualms about trying rebels for IHL violations, particularly if the state emerges victorious.

Often, however, the domestic institutions of states that recently experienced a civil war are in shambles or rebuilding, which puts such states at a disadvantage when it comes to fair domestic judicial proceedings for war criminals. When this is the case, the international community has been known to step in to try violators of IHL under special tribunals (international criminal courts and tribunals, or ICTs). The idea that even violations that occur in a non-international armed conflict can be tried by international entities arises because violations of IHL are a problem of "international concern" (Meron 1995: 560). Examples of such courts include the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). The first two are UN mandated and serviced tribunals and the latter is a hybrid court of national institutions and personnel with international assistance. Each of these ad hoc tribunals was established after the respective wars were terminated and have jurisdiction only for crimes committed in specific conflicts, limiting their ability to deter future crimes since their mandates are truncated. In an attempt to create a permanent court to try those who commit war crimes in states that lack the will or capacity to try them domestically, the International Criminal Court (ICC) was established by the Rome Statute in 1998 and entered into force in 2002.

The ICC has the jurisdiction to try war crimes committed by or on the territory of any of 121 member states[16] in any armed conflict. In practice, the Court has so far only investigated cases of and issued indictments for war crimes committed in the context of intrastate wars, namely conflicts in the Central African Republic, Côte d'Ivoire, Darfur, Sudan, the Democratic Republic of the Congo, Kenya, Libya, and Uganda. Complementary jurisdiction clauses of the Rome Statute limit the ICC's jurisdiction to those situations in which the domestic authorities are either unwilling (which is quite common when the accused are high-ranking members of ruling parties) or unable to try the accused themselves, rendering the ICC to be a court of last resort.

Observers sometimes express concern as to the politics of international criminal tribunals, specifically whether they overstep their bounds and interfere too far in sovereign domestic affairs. There is debate, for instance, as to whether it is more appropriate for the ICTR to prosecute crimes committed in Rwanda or if this should be left to the Rwandan authorities

alone: some complain that criminals receive sentences that are too light in the international tribunal, whereas others note the political nature of those brought to domestic trial. Similar debates surround the ICTY as well. And the United States is the most prominent critic of the ICC, arguing that the reach of the prosecutor and member states is too wide to be controlled should an actor accuse leaders of a powerful state of war crimes. Yet legal scholars continually reiterate the institutional limits of these tribunals, especially their nature as complementary legal institutions, to suggest that these tribunals are unlikely to be used in political ways with such strict mandates of legal fairness for the accused.

Relevant to the question of enforcing IHL in civil wars, scholars disagree about the effectiveness of international prosecutions for war crimes in terms of the actual abilities of such tribunals to carry out their mandates. When ICTs are successful in bringing indicted suspects before a panel of judges, they hand down sentences appropriate for the charges for which the person is found guilty – sentences that are served in prisons of volunteer states. Though some are granted early release for good behavior, many receive a number of life sentences to be served in foreign prisons with no hope of parole. In other words, when a state captures a suspect and turns him or her over to an ICT, the ICT can adjudicate the case fairly and according to strict legal principles and hand down costly sentences people would rather avoid.

The challenge is whether the ICT is able to actually bring suspects before its bench. The tribunal for the former Yugoslavia, for instance, indicted a total of 162 suspects under its UN mandate, and all 162 suspects either appeared for trial in the Hague or died before that was possible. The ICC, on the other hand, has issued warrants or summons to appear for twenty-seven suspects since 2002, and only twelve of these suspects have appeared before the Court, seven on their own volition.[17] All international criminal tribunals lack police or military forces under their command, so they rely on member states to investigate, arrest, and surrender suspects to the court. This problem of capture creates significant hurdles to the effectiveness of ICTs in prosecuting war criminals that are difficult for the institutions themselves to overcome (Ritter and Wolford 2010).

Nevertheless, ICTs can adjudicate cases and impose punitive costs as intended when it is in member states' interests to comply with court-issued indictments. States have incentives to comply with warrants, for instance, when those accused of war crimes are their opponents or members of rebel groups (Chapman and Chaudoin 2013: 5–6; Ginsberg 2008: 506). Simmons and Danner (2010) argue that states ratify the Rome Statute to join the ICC when they recently experienced civil wars and would like to bind themselves with third-party enforcement. By joining this institution, the state risks prosecution for war crimes and thus can signal to the population the credibility of their promise not to return to pre- and during-war atrocities, making it safe to lay down arms. Of course, this requires the threat of punishment to be carried out in practice, which is a dubious claim. Gilligan (2006) notes the challenge of capture, but argues that when leaders have a high probability of losing office and wish to seek asylum in another state, the ICC allows the receiving state to refuse the suspect.

It is possible, then, for the ICC to not only respond to and punish crimes that have taken place but also to deter future violations of IHL in civil wars. If the ICC can bring suspects before its bench, as Simmons and Danner (2010) suggest, then combatants should want to avoid committing crimes in the first place and putting themselves at risk for such prosecution. Gilligan's (2006) argument similarly suggests the possibility of a deterrent effect: if the existence of the ICC lowers the possibility of asylum when things turn sour for leaders, it should deter some war crimes in the margins. Yet deterrent effects rely on the threat that the ICC's punishment will be worse than what the accused would face by not committing the crimes and losing the war (Ritter and Wolford 2010). If the crime provides such an advantage that it is worth the possibility of going to court and living in a Spanish prison, would-be war criminals will not be deterred.

Despite the significantly increased efforts to try war criminals in international institutions, responsibility for prosecution relies primarily with states, both in a legal sense and at states' insistence. As mentioned in the discussion of complementary jurisdiction, ICTs are intended to be options invoked only when states are unwilling or unable to prosecute violators of IHL at a domestic level. Yet states have a tendency to demand that they are both willing and able to try war criminals at home. Meron (1995: 554) writes on the subject, "The sovereignty of states and their insistence on maintaining maximum discretion in dealing with those who threaten their 'sovereign authority' have combined to limit the reach of international humanitarian law applicable to non-international armed conflicts." States, in other words, have significant incentives to claim sovereignty over the prosecution of those who have attacked the state, and they can use terms of the Geneva Conventions to accuse their opponents of war crimes. The threat of international involvement in the enforcement of IHL may even motivate states to begin national prosecutions of grave breaches of IHL (Meron 1995: 555), which is a step toward what would be most preferred in terms of responsibility, but it removes the international oversight from what can very easily be a politicized process.

Conclusion

This chapter has presented the legal understanding of the obligations of warring parties in the context of civil war along with the political challenges to the actual compliance with those obligations. The Geneva Conventions, a number of supplemental treaties related to the conduct of warfare, and customary rules of IHL all combine to represent a significant set of obligations to which all armed forces in non-international armed conflicts should comply, with an eye to protecting those most vulnerable to harm in war. However, the nature of the parties involved in civil war, as well as the challenges of sovereign authority for crimes when it comes to political and legal processes in a single state, make IHL much more difficult to enforce in civil wars than in interstate conflicts.

To improve the compliance rate with IHL obligations in civil wars, the international community can take a number of steps. For one, the limited number of articles and treaties that codify expectations of appropriate actions in civil wars undermines the ability of the relevant actors to comply with said rules. As Chayes and Chayes (1993) argue, a large part of compliance with international laws is having a clear understanding of what the laws actually are. By increasing a focus on what methods are acceptable, who is protected and how, and to what standards combatants must be held, there may be improved abilities to understand and implement the legal obligations. Of course, this requires the political will of states to agree upon rules that would bind them in the conduct of war against rebels within their own borders, which states are likely to be loath to do.

Instead, the ICRC and other concerned international parties should focus on the benefits to compliance with IHL for all parties involved. Civil wars are fought on the very territory the actors hope to control, which puts the territory they value and the people they hope to control at greater risk. This means violations are likely to be higher, but the loss of those lands and peoples can represent significant resources lost after conflict termination. If the conflicting parties can see their actions as having long-lasting consequences, it is possible that reciprocity and forward-thinking utility can lead to an improvement in compliance with IHL.

These, however, are optimistic recommendations. In the immediate term, one of the primary means for garnering compliance lies in national and international prosecutions of those who violate IHL in civil wars. National prosecutions suffer from victor's politics and post-war reconstruction of institutions, which can undermine fair and just prosecutions. More importantly, if the actors do not expect prosecutions to be based in the law after the conclusion of the conflict, they have little incentive to think of it as a deterrent to violations that can give them a

tactical edge. International criminal courts and tribunals, like the ICC, can act as a stopgap to this problem when national institutions fail. While they have significant problems that undermine whether would-be violators will anticipate prosecution, the threat of such may help in the margins. And when "the margins" means even a few vulnerable lives protected, that represents a victory for IHL in civil wars.

Notes

1 "Civil war" has no legal meaning in IHL, and the Geneva Conventions refer instead to "armed conflicts not of an international character" (www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm, accessed January 26, 2013). For both brevity and consistency with social scientific research on internal conflict, this chapter will refer to civil, intrastate, or internal wars interchangeably.
2 A table listing all states party to the main treaties of IHL can be found on the International Committee of the Red Cross website, www.icrc.org/eng/resources/documents/misc/party_main_treaties.htm, accessed January 20, 2013. The ICRC considers the Geneva Conventions universally ratified.
3 All of the Geneva Conventions and their Protocols are presented in full at www.icrc.org/ihl.nsf, accessed January 20, 2013.
4 Combatants are considered *hors de combat* or "outside of the fighting" if they are rendered incapable of fighting through sickness or injury, if they are captured by an opposing party, or if they have clearly signaled their intent to surrender (Protocol I to the Geneva Conventions, Article 41.2).
5 Statute of the International Court of Justice, Article 38(1)(b).
6 For more on what constitutes the legal status of armed conflict, see ICRC opinion paper "How is the Term 'Armed Conflict' Defined in International Humanitarian Law?" written in March 2008, which can be found at: www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf, accessed January 28, 2013.
7 Further discussion of the criteria determining the presence of armed conflict and thus the applicability of IHL can be found at: www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm, accessed January 26, 2013.
8 Decision of October 2, 1995 in Case No. IT-94-1-AR72; 35 ILM (1996) 32.
9 For more discussion on abolishing the legal distinction between international and internal armed conflict, see also Crawford 2008; Mastorodimos 2010; and Willmott 2004.
10 A list of ratifying states can be found here: www.icrc.org/eng/resources/documents/misc/party_main_treaties.htm, accessed January 28, 2013.
11 This was discussed on October 12, 2012 by former ICRC legal counsel Kathleen Lawand on the ICRC's website examining "Internal conflicts or other situations of violence – what is the difference for victims?" found at: www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm, accessed January 28, 2013.
12 A press release detailing these sessions can be found at: www.icrc.org/eng/resources/documents/misc/57jr9a.htm, accessed April 29, 2013.
13 This observation is based on a statement made by the ICRC to the UN General Assembly on October 11, 2012, available at: www.icrc.org/eng/resources/documents/statement/2012/united-nations-rule-law-statement-2012-10-11.htm, accessed January 30, 2013.
14 This can be found online at: www.icrc.org/ihl-nat, accessed January 29, 2013.
15 The detailed obligations of the Geneva Conventions allow states to go even further than that – they may adopt provisions into their national legislation to give them *universal jurisdiction* over grave breaches of IHL committed by any state, a right established in customary IHL. Indeed, contracting parties are bound to prosecute anyone who commits grave breaches of IHL anywhere, or arrange for them to be tried in another state (ICRC 2004). Rule 157 states, "States have the right to vest universal jurisdiction in their national courts over war crimes," as is discussed at length in the ICRC's database on customary IHL here: www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule157, accessed January 28, 2013.
16 The States Parties to the Rome Statute are listed here: http://www2.icc-cpi.int/Menus/ASP/states+parties/, accessed January 28, 2013.
17 More details on the situations under investigation by the ICC can be found at http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/, accessed January 30, 2013.

References

Cassese, Antonio. (2001) *International Law*, Oxford: Oxford University Press.

Chapman, Terrence L., and Stephen Chaudoin. (2013) "Ratification Patterns and the Limits of the International Criminal Court," forthcoming in *International Studies Quarterly.* Online: www.pitt.edu/~chaudoin/icc.html (accessed January 25, 2013).

Chayes, Abram and Antonia Handler Chayes. (1993) "On Compliance," *International Organization* 47: 175–205.

Conrad, Courtenay R. and Will H. Moore. (2010) 'What Stops the Torture?" *American Journal of Political Science* 54: 459–76.

Crawford, Emily. (2008) "Blurring the Lines between International and Non-International Armed Conflicts: The Evolution of Customary International Law Applicable in Internal Armed Conflicts," *Australian International Law Journal* 15: 29–54.

Fleck, Dieter, Michael Bothe, Horst Fischer, and Hans-Peter Gasser, eds. (2000) *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford: Oxford University Press.

Gilligan, Michael J. (2006) "Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime," *International Organization*, 60: 935–67.

Ginsburg, Tom. (2008) "The Clash of Commitments at the International Criminal Court," *Chicago Journal of International Law* 9: 499–514.

Greenwood, Christopher. (1996) "International Humanitarian Law and the *Tadic* Case," *European Journal of International Law*, 7: 265–82.

Hegre, Håvard and Nicholas Sambanis. (2006) "Sensitivity Analysis of Empirical Results on Civil War Onset," *Journal of Conflict Resolution* 50: 508–35

Henckaerts, Jean-Marie. (2005) "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," *International Review of the Red Cross* 87: 175–212. Online: www.icrc.org/eng/resources/documents/publication/p0860.htm (accessed January 25, 2013).

Humphreys, Macartan and Jeremy M. Weinstein. (2008) 'Who Fights? The Determinants of Participation in Civil War," *American Journal of Political Science* 52: 436–55.

International Committee of the Red Cross. (2004) "International Humanitarian Law: Answers to your Questions," Geneva, Switzerland. Online: www.icrc.org/eng/resources/documents/publication/p0703.htm (accessed January 27, 2013).

Kalyvas, Stathis. (1999) "Wanton and Senseless? The Logic of Massacres in Algeria," *Rationality and Society* 11: 243–85.

Mastorodimos, Konstantinos. (2010) "The Character of the Conflict in Gaza: Another Argument towards Abolishing the Distinction between International and Non-International Armed Conflicts," *International Community Law Review* 12: 437–69.

Meron, Theodor. (1995) "International Criminalization of Internal Atrocities," *American Journal of International Law* 89: 554–77.

Morrow, James D. (2007) "When Do States Follow the Laws of War?," *American Political Science Review* 101: 559–72.

Ritter, Emily Hencken and Scott Wolford. (2010) "Bargaining and the Effectiveness of International Criminal Regimes," *Journal of Theoretical Politics* 24: 149–71.

Salehyan, Idean. (2007) "Transnational Rebels: Neighboring States as Sanctuary for Rebel Groups," *World Politics* 59: 217–42.

Simmons, Beth A. and Allison Danner. (2010) "Credible Commitments and the International Criminal Court," *International Organization* 64: 225–56.

Valentino, Benjamin, Paul Huth, and Dylan Balch-Lindsay. (2004) "Draining the Sea: Mass Killing and Guerilla Warfare," *International Organization* 58: 375–407.

Vité, Sylvain. (2009) "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations," *International Review of the Red Cross* 91: 69–94. Online: www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf (accessed January 27, 2013).

Willmott, Deidre. (2004) "Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court," *Melbourne Journal of International Law* 5: 196–219.