Commentary

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The problem of repression of violations of international humanitarian law is, as Mr Thomson pointed out, part of the wider problem of the general enforcement of international law. I think that at this point the Geneva Conventions of 1949 and the two additional Protocols of 1977 form part of the overall international legal system; although the formal distinction between the law of war and the law of peace has been abandoned since 1945, it has continued in a practical sense[1] through the separate and parallel developments of human rights law under the auspices of the United Nations (New York law) and of humanitarian law in times of armed conflict (Geneva law) by the International Committee of the Red Cross. This separation has had the advantage that it has freed the development of international humanitarian law from the political influences prevailing in the General Assembly,[2] but has also led to the unfortunate tendency of examining it in isolation from other branches of international law and of regarding it as outside the mainstream development of general principles of international law, e.g., the work of the International Law Commission (ILC). In a consideration of how to make effective the enforcement of international humanitarian law one should bear in mind other areas of international law that share the same underlying policy of the protection and promotion of human dignity so as to see whether principles, ideas or machinery for enforcement formulated or utilised in one context could be adopted or adapted for use in this one. Thus I feel it would be beneficial not only to review the provisions for enforcement in the Geneva Conventions and Protocols themselves but also to look at similar provisions in other branches of modern international law.

The need to do this is especially forceful when considering Protocol II, with which Mr Thomson did not deal, presumably because that Protocol contains no specific enforcement or supervision provisions comparable to those found in the Geneva Conventions and Protocol I. One reason for this omission was of course that States baulked at providing for international enforcement measures for internal armed conflict, as these would undermine their national sovereignty and would bestow international status on those they would define as rebels. However, Protocol II does form an internationally binding obligation upon States parties to it which is covered by general provisions of law, notably by treaty

1. See the Commentary by Dr Hossain on the paper delivered by Professor Keith, above p 36.
2. This freedom from the political divisions of the General Assembly ended at the 1974 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts where procedural and substantive controversies reflected debates in the General Assembly on similar topics: see Forsythe, "The 1974 Diplomatic Conference on Humanitarian Law: Some Observations", (1975) 69 AJIL 77.

law.[3] Further, developments in human rights law since 1945 weaken any argument that events falling under Protocol II are within the domestic jurisdiction clause (Article 2(7) of the UN Charter) and therefore of no concern to international law. Nonetheless, it must be acknowledged that the enforcement of Protocol II is an exceptionally difficult one within what is in any case a difficult area and that two particular features make it so. First, only one side to the conflict will, by definition, be a party to the Protocol (if that) and second, breaches of Protocol II are not deemed to be war crimes with universal jurisdiction as are "grave" breaches of Protocol I.[4]

I shall now be more specific and take up Mr Thomson's last very well taken point that the real need is to prevent abuses and not merely to punish those committed. Mr Thomson outlines his notion that what is paramount is to raise global consciousness of the value of the integrity of the human person and of the potentially high costs — tactically through possible reciprocal action and of adverse public opinion; morally through the fact of human degradation; and, hopefully, ultimately legally — of betraying that value. This seems to be an excellent idea which should be explored further. The aim of international humanitarian law is to protect the dignity and personality of the individual in times of crisis such as an armed conflict, so as to give all individuals a legal right to integrity of the person at all times. The corollary of this is to instil an awareness of the corresponding duty in all individuals, regardless of nationality, and, further, of the essential rightness of that duty, and to heighten awareness of the fundamental nature of the principles underlying the laws. There is no doubt that States, at least in theory,[5] accept these legal obligations as evidenced by the high number of States that have ratified the Conventions, but unfortunately their commitment falls far short of instilling in their nationals, both military and civilian, an awareness of both individual and State obligations. Many citizens, if not most, are ignorant of the existence of these obligations, and are unaware that there are any legal restrictions on the conduct of armed conflict. These comments trespass into dissemination but the topics of repression of violations and dissemination of the principles and rules of international humanitarian law are inextricably interwoven. Only through public awareness can there be any real expectation of making the Conventions effective. Indeed, I would go further than Mr Thomson. Not only is education as to the values incorporated into the Conventions needed but also as to the respect that should be accorded to the law itself so as to build up an assumption within the general population of law-abiding behaviour. Baxter questioned long ago[6] how the world community can expect the citizens of a State which can be classified as generally not law-abiding either to know of their legal obligations or to take them seriously. If disrespect for the law, any law, becomes a way of life and there is a presumption

3. In this respect Vienna Convention on the Law of Treaties, Article 60 (5), should be remembered. This Article provides that Article 60 (1)-(3) relating to termination or suspension of treaties as a consequence of material breach does not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character . . .".

4. Protocol I, Article 85 (5).

5. At January 1983, 151 States were parties to all four Geneva Conventions, 26 States were parties to Protocol I and 23 to Protocol II. (Figures issued by the International Committee of the Red Cross.)

6. Baxter, "Forces for Compliance with the Law of War", 1964 Proc ASIL 82.

that lawbreaking is a viable option, then there is almost no likelihood of it being observed in times of crisis when values are inevitably under pressure, such as armed conflict. A high degree of respect for law at the municipal level is needed to promote a higher likelihood of it holding fast during a crisis, a point that can rest only with municipal decision-makers.

Another point made by Baxter is also worth recalling. In attempting to achieve global acceptance of and adherence to these fundamental values across a vast diversity of cultures, efforts should be made to explore whether there are forces and pressures for compliance with the law existing in the many domestic legal systems that could be utilised at the international level.[7] The study at this Seminar of the protection of the individual in armed conflict in various Asian and Pacific States might begin to consider this point, for obviously the existence of such forces and their possible usefulness is something that only those familiar with particular legal and social systems could advise upon. If a respect for law at the municipal level could be fostered, which is coupled with a global acceptance of the norms of international humanitarian law, it may be possible to approach the goal of preventing abuses.

The major practical reason for denoting a particular individual's or State's behaviour as constituting a violation of law is that this determination then gives all other interested parties, as well as that party itself, a number of options to consider in response. It is important to remember that there exists a number of possible responses to a perceived violation and which one is selected will depend upon an assessment of all the surrounding circumstances, including the likely counter-response from the alleged violator. These options range from doing nothing, perhaps from fear of similar denunciations or for political or economic reasons, through informal responses such as attempting to mobilise domestic or international public opinion, to diplomatic moves, to making formal claims against the alleged wrongdoer in an international or municipal forum. The response may depend upon internal factors, for a government may find itself pressured into making some response on the international plane that it had not originally intended.

The response that Mr Thomson concentrated upon was the institution of criminal proceedings against an individual wrongdoer within the municipal courts, a duty imposed upon High Contracting Parties for grave breaches of the Conventions[8] and Protocol I.[9] He gave a very full analysis of those provisions upon which I do not wish to elaborate but only to make a couple of related points.

First, both the Conventions and the Protocols distinguish between "grave" breaches and others, a distinction that is in accordance with general treaty law.[10] While it is evidently sensible that behaviour constituting trivial or technical breaches should give rise to different options in response from grave breaches (in

7. "Those of us who are concerned with the law of war may not have done enough to relate the law to the ethical standards and local values of the vast diversity of cultures to which the law may have application" ibid 88.

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

9. Protocol I, Article 85 (1).

10. Cp Vienna Convention on the Law of Treaties, Article 60, which distinguishes between material breaches and others.

particular they do not give rise to the option of undertaking criminal proceedings), perhaps this is a regrettable differentiation. It risks giving the impression that non-grave breaches are unimportant[11] and can be ignored, and allows the counterclaim that a certain breach was not a grave one. Further, if the differentiation is to exist, the criteria for classification as grave or non-grave should be clear. Instead the relevant provisions are imprecise, unclear and technical. They are difficult to interpret in a classroom setting and are thus unlikely to be useful to or remembered by a person actually engaged in armed conflict. Most serious of all, there is no adequate machinery for the authoritative determination of a grave breach. If a grave breach cannot be easily ascertained, the consequences of its determination will fail to materialise. In practice, the finding of a grave breach is likely to be made, if at all, by a municipal court long after the event with the attendant problems of collecting evidence, of different standards of proof in different courts and the possible dangers of incompetent decisions by municipal courts on the interpretation of the texts. In a common law system this danger is enhanced by the precedential value of a decision.

Second, the duty imposed upon a State party is to bring an accused individual before its courts, and, if it prefers, to hand the individual over to another High Contracting Party for trial. The Conventions do not explicitly refer to extradition, while under Article 88.2 of Protocol I there is a duty to co-operate in matters of extradition but no more. Article 8 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft provides an example which could have been copied here to strengthen the extradition provisions. Under Article 8.2, the Hague Convention may itself serve as the legal basis for extradition where there is no extradition treaty. The purpose of the Hague Convention and the Geneva Conventions and Protocols is the same in the desire to ensure there is no evasion of the criminal process and so make effective the jurisdictional measures. The Hague provisions are stronger than those in Protocol I; they facilitate extradition and help to avoid technical hitches.

Questions of responsibility seem to be at the heart of the problem of the repression of violations. Mr Thomson has discussed how Articles 86 and 87 of Protocol I extend individual criminal responsibility as enunciated at Nuremberg, while Article 1 of all four Geneva Conventions and Article 1.1 of Protocol I impose wide obligations upon States so that breach of these obligations would give rise to international responsibility. The ILC in its draft articles on State responsibility[13] has recently formulated a concept of State criminal responsibility for breach of international obligations that are fundamental to the world community, as opposed to, and in addition to, traditional delictual State responsibility.[14] Since States accept the imposition of duties upon them by their ratification of the Conventions and Protocols, and since Article 19.3(c) of the ILC draft states that an international crime may result from "a serious breach on a widespread scale of an international obligation of essential importance for

11. An impression heightened by the duty to repress "grave" breaches but only "to take measures to suppress other breaches" (Protocol I, Article 86(1)).

12. Reprinted in (1971)[10] ILM 133.

13. International Law Commission, Draft Articles on State Responsibility, YbILC 1976 Vol 2 (Pt II) 73, UN Doc A/CN.4/L.263.

14. ILC Draft Articles on State Responsibility, Article 19.

safeguarding the human being'', it seems that there could be a linkage between these two areas of law to denote State criminal responsibility for grave breaches of the Geneva Conventions and Protocols, of for what Mr Thomson called ''crimes committed in national interest and in accordance with government policy'', as well as individual responsibility. However, the draft Article on State criminal responsiblity is very controversial and is felt by many people to be too uncertain in its repercussions. The ILC has not yet dealt with the practical consequences of a determination of State criminal responsibility, nor determined who is to be competent to make such a finding. At present, under Article 91 of Protocol I a State party is deemed responsible for violations of the provisions of the Conventions or of Protocol I and is liable to pay compensation ''if the case demands''. This presumably refers to traditional State responsibility but in any case has had no practical impact. It is questionable whether imputation of criminal responsibility on a State would allow for wider and more certain legal consequences than delictual liability and it would make possible, or even probable, such labelling being made solely for political ends. It is probably unwise at this time to move from individual responsibility to State criminal responsibility.

Returning to criminal proceedings against individuals in the municipal arena, one of the major obstacles to enforcement is that a State may decide not to prosecute its own nationals for various domestic, political reasons, while other States may be unwilling to assert criminal jurisdiction over foreigners, even assuming they have custody of the person, so that despite the formal provisions for jurisdiction no proceedings are ever actually instituted. It is certainly likely that the person involved in armed combat does not contemplate facing criminal charges, even if the laws are known. Pursuing Mr Thomson's statement that international law depends to a large extent for its enforcement on municipal law, perhaps a recent development in US municipal law could be adopted in other countries so as to provide an additional step that could be taken against violators. In the *Filartiga* case,[15] the US Court of Appeals for the Second Circuit upheld jurisdiction in a civil tort claim brought by the family of a victim of torture against the alleged torturer, despite the fact that neither the plaintiff nor the defendant were US citizens and the alleged events did not take place in the US. The ground for upholding jurisdiction was that torture violates universally accepted norms of the law of human rights, as evidenced by the many international conventions and other instruments condemning it, and could therefore form the basis of a claim despite the extraterritoriality. The underlying motivation was the desire not to allow claims of such a serious nature to fail because of lack of forum; indeed claims of *forum non conveniens* were dismissed because the Court accepted that no remedy would be forthcoming from the local Paraguayan courts. This was only a jurisdictional hearing and a hearing on the substance of the claim may present difficult problems of evidence and of hearing witnesses, but the initiative of the US courts in taking such a step is overall to be welcomed, although some reservations must be expressed. This case does demonstrate that municipal arenas can be used against acts that are contrary to international law and since the widespread ratifications of the Geneva

15. *Dolly MR Filartiga and Joel Filartiga* v *Americo Norberto Pena-Irala* (1980) 19 ILM 966.

Conventions suggest that the principles of humanitarian law too could be considered as norms of international law, perhaps other States could provide for civil jurisdiction in such circumstances. Certainly a victim who is in a State with such jurisdictional competence might be more prepared to commence an action than the State itself. Whilst the outcome may be less effective than criminal sanctions, it would be better to have a civil hearing than no legal consequences at all for violative behaviour. However, as indicated, there might also be some disadvantages that should not be ignored. Civil claims could be made irresponsibly and be used for harassment. The extraterritorial basis for jurisdiction could lead to uncertainty and be inhibiting to free travel for individuals.[16] Checks would have to be made by competent local authorities that the claim was at least valid, although that could lead to constitutional difficulties in some countries.

Turning finally to the International Fact-Finding Commission provided for under Article 90 of Protocol I, it is impossible not to agree with Mr Thomson's assessment that its powers are so restricted that it is unlikely ever to become a potent force for making effective international humanitarian law, if indeed it is ever instituted. Repetition of the Article 36.2 of the Statute of the International Court of Justice formula is unlikely to be any more successful in this context than it was in the original one. It is unfortunate that Protocol I makes only this one provision for enquiry. What might have been preferable would have been to have made provision for as many different methods for neutral enquiry into alleged violations of the Conventions and Protocol I as possible. An inability to elucidate the facts of any alleged violation will make redundant the envisaged consequences of a finding of a grave breach. The establishment of the fact finding commission in this form was a compromise, and, as is usually the case with a compromise, Article 90 fails to please anybody. Those who argued that national sovereignty would be harmed by a mandatory, forceful fact finding commission have made totally ineffective the provisions for the Internatioanl Fact-Finding Commission.

In some ways the Geneva provisions on fact finding,[17] which remain in force, were rather more flexible in that if a party to the conflict so requested an enquiry had to be held and the enquiry could be conducted by any means agreed upon by the parties. Despite this flexibility, the provisions are too general, and since they depend on a request to be activated, in practice no enquiry has ever been instituted under these provisions. It has been urged[18] that what is needed is for maximum psychological pressure to be put on States to comply with the

16. The policy arguments that are raised against the desirability of extraterritorial jurisdiction based on passive personality are equally tenable here. Any such civil jurisdiction should be reserved only for cases which constitute grave breaches of the norms of international law. There would also be the same problems of different municipal courts determining what amounts to such a breach and of different standards in different jurisdictions. Torture is a clear case, but other examples may be more problematic.

17. First Convention, Article 52; Second Convention, Article 53; Third Convention, Article 132; Fourth Convention, Article 149.

18. See e.g. the statement of the Australian delegate (speaking in the context of supervision) at the Diplomatic Conference, Second Session, 1975: "what was needed . . . was a text which would place maximum pressure upon belligerent States . . .". CDDH/I/SR.19 at 4–5, cited in Forsythe "Who Guards the Guardians: Third Parties and the Law of Armed Conflict" (1976) 70 AJIL 41.

Conventions and that one way of doing this is to create expectations as to the required legal standard of behaviour, whatever the precise obligations.[19] Perhaps the provision of a number of different, specified methods for fact finding might have been more successful so as to create the expectation that there should be some enquiry into the facts. It is probably harder for a State to resist all proposed methods of enquiry than for it to refuse to use the International Fact-Finding Commission, which is in any case optional. The technique which was eventually adopted at UNCLOS III for dispute settlement procedures, i.e., use of one of a number of named alternatives might have been more effective in this context.

Both the institution of individual criminal proceedings, and the International Fact-Finding Commission making an enquiry, can occur only after the event of an alleged violation and assume at least the likelihood that violations have in fact occured. However, the repression of violations assumes restraining and preventing breaches from ever happening. In Forsythe's terms,[20] it involves encouraging the implementation of the law, including providing effective assistance and protection to all those included within its terms and in providing minimum supervision in times of need. Logistic aid, technical aid and practical aid are all included. It is necessary to stress the time element of the Conventions and Protocols; the obligations incurred do not commence at the time of an outbreak of armed conflict but from as soon as they enter into force for a particular party, so as to forestall a breakdown when and if an armed conflict does arise. The provisions of the Conventions and Protocols relating to the availability of legal advisers, the duty on parties to train qualified persons to facilitate application of the Conventions, and to dissemination in general are all part of the machinery for the repression of violations, which should be complied with prior to an outbreak of armed conflict. These are positive duties undertaken by States and their performance is irrelevant to a condition of peace or hostilities.

Although attention should be given to the educative process referred to by Mr Thomson to make more effective those measures that are in force, further formal agreement (which I admit is unlikely in the near future) is needed to strengthen the enforcement provisions. Perhaps at some stage some thought could be given to the drafing of a Protocol to do this, along the lines of the Draft Optional Protocol to the Convention against Torture[21] which is primarily on enforcement. Although such a Protocol may never be implemented, I feel, perhaps idealistically, that the very act of formulating such standards itself assists in the raising of normative values and puts psychological pressure for compliance on States.

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19. Ibid, 51.

20. Ibid, 59.

21. United Nations Commission on Human Rights: Draft Optional Protocol to the Draft International Convention against Torture and other Cruel, Inhuman or Degrading Treatment (UN Doc E/CN.4/1409 91980, reprinted in (1980) 19 ILM 891).