



Panel Discussion: 'The Role of International Criminal Law in Fostering Compliance with International Humanitarian Law: Past and Future Perspectives'

Launch of Vol. 17 of the *Yearbook of International Humanitarian Law* "1914-2014: WWI Centenary, 100 Years of Warfare Evolution" and the new issue of the *International Review of the Red Cross* on "The Evolution of Warfare".

The International Committee of the Red Cross (ICRC) and the T.M.C. Asser Instituut's [International Humanitarian and Criminal Law Platform](#) (IHCL Platform) hosted a panel discussion in the beginning of November 2016 that examined the role of international criminal law (ICL) in fostering compliance with international humanitarian law (IHL). This discussion took place within the framework of the ICRC's Conference Cycle on '[Generating Respect for the Law](#)'. Dr Christophe Paulussen, Senior Researcher at the T.M.C. Asser Instituut and Coordinator of the IHCL Platform, commenced the evening by welcoming the participants and the audience. He highlighted the aims of IHCL Platform, notably including bridging any existing gaps between scholars of IHL and ICL.

Vincent Bernard, Head of Law and Policy Forum and Editor-in-Chief of the *International Review of the Red Cross* at the ICRC, followed Dr Paulussen and his remarks focused on the importance of fostering compliance with IHL. In particular, Mr Bernard discussed the need for regular exchanges of information between IHL and ICL practitioners who are largely based, respectively, in Geneva and The Hague. This communication is especially important in light of the violations of IHL that are being constantly reported, including attacks on humanitarian workers and hospitals. Vincent Bernard questioned whether the trends reported by media and NGOs indicated a real weakening of compliance with IHL. While media and NGO reports understandably give the opposite impression, IHL is, in all armed conflicts and by all parties, actually more often respected than violated. Examples of respect must be made public as the perceived disrespect of IHL is even worse than its actual disrespect, as it further undermines the willingness to respect it. Within this framework, Vincent Bernard highlighted several ongoing research programs at the ICRC that focus on identifying not only new trends but also instances of compliance with IHL. The thematic project on "Generating Respect for the Law" ultimately intends to explore what factors, including the role played by ICL, influence the respect for IHL.

Terry Gill, Professor of Military Law at the University of Amsterdam and the Netherlands Defence Academy and Editor-in-Chief of the *Yearbook of International Humanitarian Law*, built upon these ideas and discussed the particular role of ICL given the changing nature of warfare over time.

Prof. Gill briefly discussed the evolution of warfare, starting with the use of mass conscription in state armies during World War 1 and ending with modern conflicts, which involve hybrid warfare, new technologies and, consequently, new challenges. ICL was proposed as one possible answer to some of the challenges in light of its connections with the development of IHL. Prof. Gill then reflected upon the ongoing relationship between ICL and IHL, positing that, while there have been gains, there are still dangers if the two bodies of law diverge too much.

Following these introductory remarks, the moderator Margherita D'Ascanio, Law and Policy Advisor at the ICRC, formally initiated the panel discussion and introduced the speakers. In her comments, she highlighted that there is an urgent need to delve deeper into the issue of generating respect for IHL and to better understand the interactions between ICL and IHL.

The first panellist, Dr Guido Acquaviva, the Deputy Registrar of the Kosovo Specialist Chambers, examined how ICL influences IHL via the practice of international criminal tribunals. In so doing, he looked at how the criminal tribunals foster compliance with IHL on a practical level and whether they deter possible perpetrators from acting at all. Dr Acquaviva's point of departure was the Preamble to the Rome Statute of the International Criminal Court (ICC), which states that the ICC aims "to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes". While he suggested that it's unlikely potential offenders read judgments from international tribunals, this does not mean the latter have no effect. On the contrary, these judgments perhaps speak indirectly to perpetrators by influencing the legal awareness of those involved with the case and, ultimately, the general public. In terms of actual effects of tribunals on IHL, Dr Acquaviva presented three possible and tangible impacts: first, some judgments, including the *Gotovina* and *Tadić* judgments, have directly affected the development or interpretation of IHL; second, there is evidence that states have changed their behaviour in response to the existence of international criminal tribunals, for example by initiating domestic prosecutions or amending domestic laws; and third, by the incorporation of legal findings into military manuals and other documents used by actors 'in the field'. However, Dr Acquaviva argued that the real test was whether we are creating a network of institutions that is effective, in the sense of being able to induce change away from the status quo in a desired direction, as a system. Thus, the essential question is whether the system, as a whole, fosters better compliance with IHL. Arguably, this is happening, as the question has over the past two decades has become why don't we punish *all* persons accused of committing serious violations of IHL – a question almost unheard of until recent times. Thus, the change of the general ethos – in the sense of the commonly held assumptions about the system for IHL compliance – is gradually occurring, although we are still clearly in a primitive stage of ICL development.

Dr Robert Heinsch, Associate Professor of International Law at Leiden University, then continued the discussion and focused on the historical and future development of the interplay between IHL and ICL. Dr Heinsch traced the history of IHL, the 'rules', and ICL, the 'enforcement', back to Greco-Roman times, emphasising that while the rules may have been present, they didn't always have effective corresponding enforcement mechanisms. During World War 1 and World War 2, the interaction between IHL and ICL was reinvigorated, with IHL conventions paving the way forward for ICL in the Nuremberg and Tokyo Tribunals. He then discussed the Additional Protocols of 1977 which acknowledged that 'grave breaches' amount to 'war crimes'. Following this, the last 25 years have seen the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the ICC as well as the release of the ICRC's Study on Customary International Humanitarian Law. Turning to the present, Dr Heinsch drew attention to the increasing importance of national prosecutions in light of the closure of international tribunals. He argued that the questions relating to substantive law have been mostly dealt with by international tribunals, leaving aside questions of procedural law that can be considered in national jurisdictions. Similarly, there is a stronger focus on non-international armed conflicts and a diversification in the legal instruments available for such contexts to generate better respect, including the use of deeds of commitment or unilateral declarations by non-state armed groups. He concluded by posing several questions, including whether ICL can further enhance compliance with IHL, whether national and international systems can cooperate better, and whether there is a role for IHL outside ICL.

Stéphane Bourgon, an international criminal defence attorney who has worked at the ICTY, ICTR, Special Tribunal for Lebanon and ICC, spoke third and began by describing his current role and responsibilities in his work at the ICC. He described this role as aiming to ensure the fairness of trial proceedings and to represent his client's interests to the best of his abilities. He then turned to the question of whether ICL fosters compliance with IHL, limiting his comments to international criminal trials. He suggested compliance could be achieved by disseminating knowledge on the law itself and by providing a reason to comply with the law. In this regard, Mr Bourgon argued that international criminal trials contribute to the dissemination of knowledge if judgments are fair and are perceived to be so, and if they are of sound quality in terms of the interpretation and application of the law. He then suggested that compliance is enhanced when IHL is incorporated into domestic laws, and where fair and sound judgments are disseminated. Mr Bourgon suggested that international criminal tribunals can also hurt compliance with IHL, and he provided two examples. First, where the Prosecution brings charges for violations that are not already provided for in law. Second, where modes of liability are understood expansively and result in arbitrary convictions. Mr Bourgon concluded by stressing the need to first develop the law and subsequently apply it, rather than using the application of the law to simultaneously develop it. Building upon Dr Acquaviva's earlier presentation, Mr Bourgon suggested there is still work to do in order to create an effective system of ICL.

Following the panellists' presentations, Ms D'Ascanio opened the question and answer session to the audience. This led to an insightful discussion involving all the panellists on topical issues such as: how the principle of legality operates in monist states who have joined the ICC and pursue domestic cases on this basis; whether prosecutorial choices in international criminal tribunals between 'small fish', such as Tadić, and 'big fish' have an impact on compliance with IHL and whether it is more important to see 'big fish' being prosecuted today; whether, in situations where ICL is perceived as going beyond the law in order to achieve a conviction, there is a quantifiable, negative impact on compliance with IHL; how IHL operates and binds parties in the context of the conflict in Syria, particularly in light of the existence of many non-state armed groups who are labelled as 'terrorists'; and how the departure of three states from the ICC will impact upon future compliance with IHL.

Ms D'Ascanio then concluded the evening and attendees were invited to a reception.