Implementation of International Humanitarian Law

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Implementation of International Humanitarian Law

- Definition and scope
- Preventive measures to take in peacetime
- Measures to ensure compliance during armed conflicts
- Curbing violations of IHL
- Implementation in non-international armed conflicts

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Definition and Scope

- = translating the rules of IHL into action
- Covers all measures that must be taken to ensure the full respect of IHL
  - all persons – civilian and military – must be aware of the rules of IHL
  - structures, administrative procedures, and personnel necessary for the application of IHL must be in place
  - violations of IHL must be prevented, and if not, repressed

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Responsibility for Implementation

- All states have the clear obligation to adopt and apply measures of implementation of IHL
  - executive, legislative, and judicial branches; armed forces; and other state entities
  - professional associations
  - volunteer organisations
  - National Red Cross and Red Crescent Societies

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Jump-Starting the Implementation Process

- National authorities
- National Committees for the Implementation of IHL
- National Red Cross and Red Crescent Societies
- International organisations
- ICRC Advisory Services

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Relevant Time Frames

- Before armed conflict has broken out
- During armed conflict
- After armed conflict

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Preventive Measures to Take in Peacetime

- General principle: *pacta sunt servanda*
- General obligation of dissemination
- Special obligation of dissemination
- Instructions to the armed forces
- Legal advisers in the armed forces
- Communicating translations of IHL texts
- National legislation on implementation
- Practical measures

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General Principle: *Pacta Sunt Servanda*

- "The High Contracting parties undertake **to respect and to ensure respect** for the present Convention/this Protocol in all circumstances." (Common Art. 1, GCs I – IV; Art. 1, AP I)
- "The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol. [They]…shall give orders and instructions to ensure the observance of the Conventions and this Protocol, and shall supervise their execution." (Art. 80.1 and .2, AP I)

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General Obligation of Dissemination

- Making the rules known:
  - "The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel, and the chaplains."

(Arts. 47/48/127/144, GCs I – IV; see also Art. 83, AP I)

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Special Obligation of Dissemination

- Onus on persons who, in times of armed conflict, assume a special responsibility in the implementation of the law
  - civilian or military authorities who assume responsibilities for protected persons in times of war "must possess the text of the Convention and be specifically instructed as to its provisions"

  (Art 127.2, GC III; Art. 144.2, GC IV)

  - such authorities must also be "fully acquainted" with the Conventions and the Protocol

  (Art. 83.3, AP I)

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Instructions to the Armed Forces

- Specific provision about instructions to be given to members of the armed forces:
  - "In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol."

(Art. 87.2, AP I)

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Legal Advisers in the Armed Forces

- Specific provision about the role of legal advisers:
  - "The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application o the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject."

(Art. 82, AP I)

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Communicating Translations of IHL Texts

- States must translate the texts of the Geneva Conventions and Additional Protocol I into national languages and must communicate those translations to one another as well as relevant national laws and regulations

(Arts. 48/49/128/145, GCs I – IV; And Art. 84, AP I)

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National Legislation on Implementation

- If a constitutional system requires international treaty rules to be codified by national legislation into domestic law for those rules to be applicable, such legislation must be adopted in peacetime (Arts. 48/49/127/145, GCs I – IV, Art. 84, AP I)
- Even when provisions of IHL directly qualify as internal law or as customary international law that applies internally, national legislation must be adopted to make the laws operational

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Practical Measures

- States must train qualified personnel and legal advisers (Arts. 6 and 82, AP I)
- Combatants and other personnel need identity cards/tags (Arts. 16, 17.1, 27, and 40, GC I: Arts. 19, 20, and 42, GC II; Arts. 4.A.4 and 17.3, GC III; Arts. 20.3 and 24.3, GC IV; and Arts. 18 and 79.3, AP I)
- Military missions must be separated as much as possible from protected objects and persons (Art. 19.2, GC I; Art. 18.5, GC IV, Arts 12.4, 56.5, and 58 (a) and (b), AP I)

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Measures to Ensure Compliance during Armed Conflicts

- Obligation to suppress breaches of IHL
- Cooperation with the UN
- Protecting Powers system
- Substitutes for protecting powers

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Obligation to Suppress Breaches of IHL

- Derives from obligation to "respect" in Common Art. 1, GCs I – IV, Art. 1, AP I
- But expressly reaffirmed in Arts. 49/50/129/146, GCs I – IV and Art. 85.1, AP I
- Special responsibility for military commanders under Arts. 87.1 and .3, AP I

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Cooperation with the UN

- "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in cooperation with the United Nations and in conformity with the UN Charter" (Art. 89, AP I)

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Protecting Powers System

- "[A] State instructed by another State (known as the Power of Origin) to safeguard its interests and those of its nationals in relation to a third State (known as the State of Residency)."

Commentary to the Geneva Covention I, p. 86

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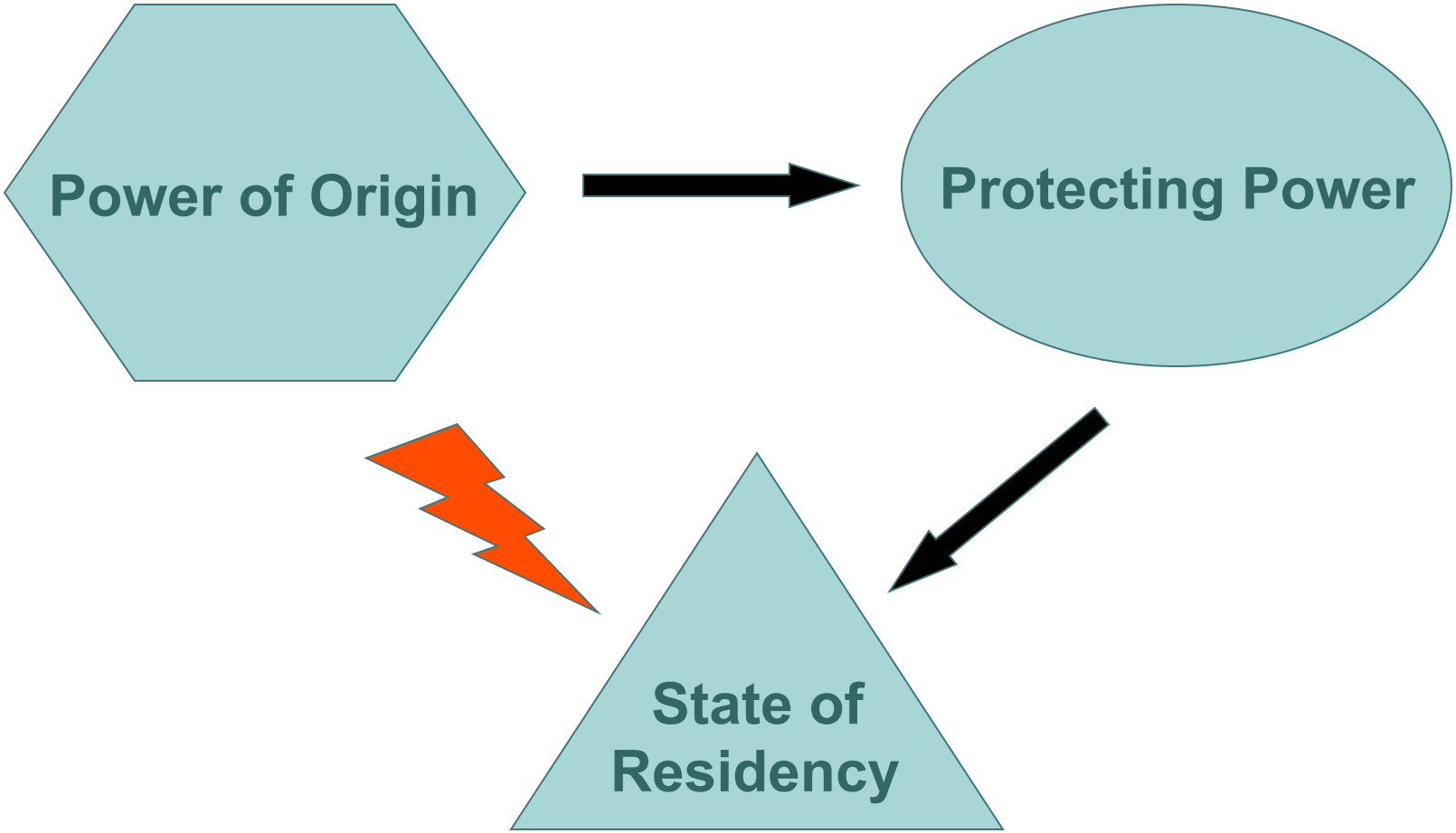
Protecting Powers System



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Protecting Powers System

- Arts. 8/8/8/9, GCs I – IV and Art. 5, AP I
- Over 80 provisions of the Geneva Conventions and Additional Protocol I mention protecting powers

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Tasks of Protecting Powers

- Arranging visits to protected persons (e.g., POW camps)
- Creating hospital zones
- Supervising relief missions and evacuations
- Receiving applications from protected persons
- Attending judicial proceedings against protected persons
- Forwarding information (e.g., wounded, sick, dead)

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Substitutes for Protecting Powers

- Parties can designate a substitute for the protecting powers, provided it "offers all guarantees of impartiality and efficacy"

(Arts. 10/10/10/11, GCs I – IV; Art. 5.4, AP I)

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ICRC as Substitute for Protecting Powers

- Generally has no interest in substituting for Protecting Powers since it can fulfill most of the same functions on its own right
- Has acted as *de facto* substitute

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Curbing Violations of IHL

- General obligation to censure grave breaches
- Responsibility of superiors
- Mutual assistance in criminal matters
- Inquiry procedures
- *Ad hoc* tribunals
- International Criminal Court

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General Obligation to Censure Grave Breaches

- High Contracting Parties are obliged to respond to violations known as "grave breaches" (Arts. 50/51/130/147, GCs I – IV; Arts. 11.4, 85.3, and .4, AP I)
  - universal jurisdiction: anyone, anywhere, anytime
  - states must enact appropriate domestic legislation
  - no special agreements possible to circumvent "grave breaches" regime

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Responsibility of Superiors

- Superiors responsible for breaches committed by a subordinate "if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that he was committing or going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach." (Art. 86.2, AP I)
- High Contracting Parties must instruct their military commanders to repress and report breches that they have been unable to prevent their subordinates from committing (Arts. 87.1 and .3, AP I)

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Mutual Assistance in Criminal Matters

- High Contracting Parties required to "afford one another the gretest measure of assistance" in criminal proceedings"

(Art. 88.1, AP I)

- High Contracting Parties required to "co-operate in the matter of extradition"

(Art. 88.2, AP I)

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Inquiry Procedures

- Geneva Conventions provide that "an enquiry shall be instituted, in a manner to be decided between the interested Parties" concerning alleged violations of the Conventions (Arts. 52/53/132/149, GCs I – IV)
- Additional Protocol I provides for a Meeting of High Contracting Parties "to consider general problems concerning the application of the Conventions and of the Protocol" (Art. 7, AP I)
- Additional Protocol I establishes an International Fact-Finding Commission (Art. 90, AP I)

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International Fact-Finding Commission

- Can inquire into alleged violations as long as both parties to a conflict agree on its competence – either by general declaration or on an *ad hoc* basis
- Officially constituted in 1991
- To date, 65 states have accepted the Commission's competence
- Composed of 15 members "of high moral standing and acknowledged impartiality"
- Results only made public with the agreement of the parties

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Ad Hoc Tribunals

- ICTY and ICTR were established by the Security Council to punish violations of international law
- The Special Court for Sierra Leone was established by agreement between the Government of Sierra Leone and the UN to prosecute violations of both international and domestic law

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International Criminal Court

- Permanent institution, established by international treaty
- Jurisdiction over war crimes, crimes against humanity, and genocide, in both international and non-international armed conflicts
- Complements national jurisdictions
- Rome Statute entered into force on 1 July 2002

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Implementation in Non-International Armed Conflicts

- Obligation to disseminate IHL "as widely as possible" (Art. 19, AP II)
- The right of the ICRC to offer its services (Common Art. 3, GCs I – IV)

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- Concluding remarks

Thank you!