

Global Conference

on

“Reclaiming the Protection of Civilians under International Humanitarian Law”

23 – 24 May 2013, Oslo Kongressenter, Oslo, Norway

Talking Points for Working Session 5:

Strengthening Accountability

A. Introduction

1. The term accountability invokes ethical, legal, as well as public policy dimensions. On the ethical front, it simply entails taking responsibility for one’s actions and being answerable for their resulting consequences. The legal aspect requires the development of rules, mechanisms, and remedies. The public policy feature relates to the legitimacy governing the relationship between individuals and institutions.
2. In this intervention, I would like to touch on three main issues: (i) the rules; (ii) accountability mechanisms; and (iii) the rights of victims and being answerable for their resulting consequences.

a. The Rules

3. It is difficult to talk of international humanitarian law (IHL) in isolation. IHL is an integral body of international law. At the same time, when considering IHL, other relevant branches of international law, particularly international human rights law (IHRL) and international criminal law (ICL), must be taken into account. This will benefit IHL when there is a perception of shortages or gaps and can strengthen compliance with IHL.
4. IHRL and IHL apply in situations of armed conflict in a complementary manner to increase the protection of civilians; both seek to protect human life, prohibit torture and cruel treatment, and prescribe basic rights for persons subject to a criminal justice process. They prohibit discrimination, comprise provisions for the protection of against sexual and gender-based violence, and regulate aspects of the right to food and health. These branches of law, as well as ICL, have their compliance mechanisms, which are and should be relied upon to heighten compliance with IHL.¹ The *ad hoc* tribunals contributed to bringing a key part of IHRL and IHL together with regard to international

¹ It is hence no surprise that there is much borrowing from international human rights mechanisms when ideas of bringing compliance to IHL are being discussed, including a Special Rapporteur, a Treaty Body, even a High Commissioner for IHL.

crimes. Now the International Criminal Court (ICC), with the ratification of its Statute reaching 122 State Parties, will bring these bodies of law even closer.

b. Accountability Mechanisms

5. The exercise of making States, institutions, and individuals answerable for the policy dimensions of a decision, as well as the resulting consequences of one's action, is a central feature of accountability. Accountability is a process as well as an outcome, which enables the development of a narrative by which what actually happened is established. In its broad sense, accountability can be pursued through many avenues at national and international levels: in the context of inter-state fora, criminal prosecutions, non-judicial accountability processes (commissions of inquiry, truth and reconciliation commissions), reparations, and national institutional reform. We can also see measures such as sanctions and travel bans as contributing to accountability, particularly as forms of satisfaction and guarantees of non-recurrence.
6. There is now a growing expectation that those engaged in armed conflict take responsibility for their actions. They should be answerable for the consequences stemming from their conduct. Here, the international community has been putting emphasis on the documenting of the effects of hostilities by these accountability mechanisms to ensure awareness of the effects, and, crucially, to ensure accountability for the violations of human rights and international humanitarian law. In these ways, accountability mechanisms are directly improving the protection of civilians.
7. Let me now come to the commissions of inquiry (COIs). The Security Council and, now more commonly, the Human Rights Council have established fact-finding mechanisms (including assessment missions, fact-finding missions and international COIs) to assess the implementation of both IHRL and IHL. These mechanisms play an extraordinarily important role in documenting the effects of hostilities on civilians, both during the conflict and post-conflict.
8. The Office of the High Commissioner for Human Rights (OHCHR) has to date supported the work of many such investigative bodies. In fact, OHCHR's support role goes back to the Commissions of Experts on Yugoslavia (1993) and Rwanda (1994). Since then the Office has provided support for over 30 COIs mandated by the Security Council and the Human Rights Council, including the International Commission of Inquiry on Darfur, United Nations Fact-Finding Mission on the Gaza Conflict, Independent International Commission of Inquiry on Côte d'Ivoire, and the International Commission of Inquiry on Libya. We are currently supporting two COIs addressing events in Syria and the Democratic People's Republic of North Korea.
9. COIs are composed of members selected on the basis of their integrity, impartiality, independence and expertise. Typically, the expertise is required in the areas of IHRL, IHL, and/or ICL. Notably, since 2004, a number of international and national judges and prosecutors have served as members of COIs, their expertise in the relevant bodies of law and procedure making an invaluable contribution to the work of COIs.²

² In addition to Judge Nino Cassese, who presided over the Darfur Commission in 2004-2005; ICTY former Prosecutor Judge Goldstone presided over the Commission that considered the situation in the Occupied Palestinian Territory and Southern Israel in 2009; Mr. Mohammed Bedjaoui, former ICJ President, was the

10. The COIs are supported by a separate Secretariat, which is established by OHCHR. A Secretariat often includes military experts and analysts in addition to legal advisors versed in IHRL, IHL and ICL. Modern technology tools are used to document and verify information, including satellite images, thanks to our cooperation with the UNITAR Operational Satellite Programme, UNOSAT. As the possibilities to film and document human rights violations instantaneously is growing, OHCHR is also developing capacity to verify the authenticity and credibility of video footage it now receives on regular basis.
11. A common mandate of a COI is to examine violations of IHRL and IHL that are taking place. Over the years, the functions of COIs have been changing, including in light of the advances made in ICL. Human rights fact-finding was originally centred on State responsibility and, traditionally, the focus of COIs has been on State policies and the behaviour of various State institutions and actors. Now, it is also increasingly recognized that non-state actors de facto have obligations.³
12. Furthermore, the question now typically asked is whether the violations of IHL and IHRL constitute a pattern of violations, which would indicate that the gravity threshold for international crimes has been met. Determining a pattern of violations is also important in assessing whether not only State responsibility, but also individual criminal responsibility can be invoked.
13. Bringing issues closer to ICL, it is now not un-common that COIs have a mandate not only to investigate alleged reports of violations committed by “all parties”, but also to identify or name the perpetrators. Drawing on the important rights of presumption of innocence and the right to fair trial, a number of COIs have decided to withhold the names of these persons from the public domain, and instead placed a list of names in a sealed file that has been given to the Secretary-General or High Commissioner for Human Rights, to be handed to a competent prosecutor to use as he or she deems fit for his or her investigations. The first time this mandate was given to a COI was in the context of the investigation in Côte d’Ivoire. The mandate was later repeated in relation to the Darfur COI. This mandate is also now an integral part of the Syria inquiry.
14. COIs do not carry out criminal investigations, and the most appropriate standard of proof has been established, e.g. by the Darfur COI, as requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.⁴ Additionally,

Chairman of the International Commission of Inquiry on Guinea; former ICC President Philippe Kirsch presided over the International Commission of Inquiry on Libya; Ms. Christine Chanet, Judge of the Court of Cassation of France and member of the United Nations Human Rights Committee, chaired the International Fact-Finding Mission on Israeli Settlements. Currently, Madame Carla del Ponte, former Chief Prosecutor of the ICTY, is a member of the International Commission of Inquiry on the Syrian Arab Republic, and Justice Michael Kirby is presiding over the International Commission of Inquiry on the Democratic People’s Republic of North Korea.

³ See e.g. the COI on the Syrian Arab Republic, which has considered that armed groups have human rights obligations that gradually increase in line with the control they exercise: “At a minimum,” the Commission found, “human rights obligations constituting peremptory international law (*ius cogens*) bind States, individuals and non-State collective entities, including armed groups.” (A/HRC/19/69, para. 106) It also stated that where actors exercise de facto control over territory, they must “respect the fundamental human rights of persons forming customary international law.” (A/HRC/21/50, Annex II, para. 10).

⁴ Issues of threshold and standard of proof with regard to COIs are often raised. The Darfur COI established a method of work, which became OHCHR standard of proof that it would apply in its investigations. In view of

COIs obviously do not make final judgments as to criminal guilt; rather, depending on their mandates, they may make assessments regarding possible suspects that would pave the way for future investigations and possible prosecutions.

15. COIs have often led to judicial mechanisms. The commissions on the former Yugoslavia and Rwanda resulted in the establishment of the ICTY and ICTR. The Security Council referred the situations in Darfur and Libya to the ICC. Investigations were opened in Côte d'Ivoire and Kenya following elaborate fact-finding work. Following the documentation of extensive violations of IHRL and IHL by the Syria COI, and its conclusion that crimes against humanity have been perpetrated in Syria, the High Commissioner for Human Rights has consistently advocated for the situation to be referred by the Security Council to the ICC. Similarly, the COI findings were cited in a joint letter sent in January of this year from Switzerland and 56 other States from all regions, in which they asked the Security Council to refer the situation in Syria to the ICC.
16. Accountability also results from the ability of COIs to provide the truth to the victims about what has happened. They also provide means to accountability through heightening awareness of the effects of the violations on the affected populations and providing a credible basis for the Security Council, the Human Rights Council, and the wider UN system to make informed decisions about the appropriate response, including various accountability measures.
17. Essentially the fact-finding exercise is aimed at changing conduct. For instance, in its report presented to the Human Rights Council in March, the International Fact-Finding Mission on Israeli Settlements called for Israel to deliver accountability for human rights violations linked to the presence of settlements, including through provision of remedies to victims. It called on all States to assume their responsibilities in relation to a State that is breaching peremptory norms of international law. In addition, it called on private companies to take all necessary steps – including by terminating their business interests in the settlements – in order to ensure they are not adversely impacting the human rights of the Palestinian people.

c. Accountability for the Victims

18. Let me finally address the issue of legitimacy that I mentioned earlier, which stems from the relationship between individuals and institutions. This depends upon accountability for victims for all harm suffered, including that which results from conduct that has been deemed lawful. While there are multiple reasons for holding persons who violate the law accountable (e.g. enforcing the law and ensuring future compliance with the law), the ultimate purpose must be to provide a remedy to the victims of the violation, and redress the harm caused to the victims of the violations. This underlies all the work of OHCHR.

the limitations inherent in its powers, the Darfur Commission decided that it could not comply with the standards normally adopted by criminal courts (proof of facts beyond a reasonable doubt) , or with that used by international prosecutors and judges for the purpose of confirming indictments (that there must be a *prima facie* case). It concluded that the most appropriate standard was that “requiring a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime”.

19. Additionally, arguably, a person can act in a legal manner, but one that may be not legitimate because of its devastating impact and resulting consequences. This dimension of accountability exceeds legal rules and foregrounds the ethical imperative of the discussion. Thus, in some situations, even when the action has been deemed legal, ethics demands that the consequences be addressed. Take, for example, NATO's obligation pertaining to alleged violations of IHL during its military campaign in Libya. The Libya COI found that "NATO did not deliberately target civilians in Libya. For the few targets struck within population centres, NATO took extensive precautions to ensure civilians were not killed. However, there were a small number of strikes where NATO's response to the Commission has not allowed it to draw conclusions on the rationale for, or the circumstances of the attacks."⁵ The COI made a number of recommendations concerning further investigations by NATO and compensation to victims. In its final letter to the Libya COI, NATO stated that while its operation in Libya had been terminated, "a wide range of parties may and will gather information relating to strikes, and that information will in turn be given due consideration." On the issue of compensation, it noted a lack of legal obligation or practice requiring the compensation for damage caused during "lawfully-conducted military activities", and its desire and intent to support a Libyan-government lead process to indemnify victims.⁶

B. Conclusion

20. In the context of conflict, there is a wide spectrum of policy options for actors to choose from, and often there are grey zones. As Harold Koh, the former Legal Advisor of the US State Department, is fond of saying, "a measure can be lawful but awful". Leadership is not only about doing the right thing legally, but is about also being seen as doing the right thing on moral and ethical grounds. This is often where legitimacy will be anchored. IHRL and IHL, applied during the very difficult times of armed conflict, are the ultimate test for this legal and moral imperative, with the protection of civilians is at its centre. Our hosts have done us all a great favour for pushing us to reclaim this protection.

⁵ A/HRC/19/68, paras. 89, 812. It also recognised that the "Commission recognises the large numbers of sorties and the proportionally low number of civilian casualties in comparison to other campaigns figures show the campaign conducted by NATO was conducted with precision weapons and a demonstrated concern to avoid civilian casualties".

⁶ See, letter dated 15 February 2012, which states, "[t]here is no legal obligation to provide compensation for damage occurring in the course of lawfully-conducted military activities, nor is it the case that the establishment of programs for compensation for such damage has become the standard or expected practice. Any issues of compensation are accordingly questions of a political character. It is in fact our understanding that the Libyan representative recently informed the Security Council that a commission is being formed to consider questions of civilian casualties and that his government plans to establish a mechanism to indemnify victims following its investigations. NATO has made clear to the government of Libya its desire and intent to be supportive of this process."