NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: THE CASE OF ESTONIA

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1. Introduction

International humanitarian law is a set of rules that seeks to limit the effects of armed conflict. Its goal is to protect people who are not taking part in hostilities and to restrict the means and methods of warfare to what is necessary for the attainment of a military aim. The 1949 Geneva Conventions,[1] the main treaties of humanitarian law, have been accepted by every state in the world. However, becoming a party to these instruments is only the first step. The rules must be acted upon, that is to say humanitarian law must be implemented.

If international law is seen as a part of national law, as is the case in Estonia, then it may presumably also be implemented and interpreted as national law. In such case international law may have as many interpretations as there are different nations.[2] This is one of the reasons why national implementation must be examined when addressing international humanitarian law. The implementation of humanitarian law is the domain of states that can choose the best measures for doing so. In that sense, international treaties never stand alone, but rather take effect when states begin implementing what is in them. While the Geneva Conventions and other related documents are the same for every state party, national implementation gives the rules within them a distinctive face.

[1] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War], 12 August 1949, in force 21 October 1950 – 75 UNTS 31, 85, 135 and 287 (in force for Estonia 18 July 1993 – RT II 1999, 17, 107; 18, 116; 19, 117; 20, 120).

[2] **V. Heiskanen.** 1990. The Relation of International and Municipal Law. – Finnish Yearbook of International Law, Vol. 1, p. 179.

All states have an obligation to adopt and carry out the measures necessary to implement humanitarian law.[3] Bodies responsible for this can be various ministries, the parliament, the courts, the armed forces, universities, etc. In some cases the Conventions stipulate specific responsibilities and in others they create general obligations to make sure that internal laws are in conformity with the Conventions.

Measures for implementation must be taken in both wartime and peacetime, as it may be too late to implement many of the provisions if hostilities have already begun. Three keywords could be used to summarise such measures: disseminating, organising and sanctioning. The dissemination of international humanitarian law means that both civilians and military personnel are made familiar with the rules within this branch of law. Organising means that all the structures, administrative arrangements and personnel required for compliance with the law are in place. Sanctioning means that violations of humanitarian law are prevented as much as possible and punished when they do occur.

Each of these obligations will be briefly analysed below, followed by comments on the situation in Estonia. As there are over forty provisions in the Geneva Conventions and their Additional Protocols that require implementation only a brief overview will be given in this article.

2. Disseminating and Other Informative Obligations

Popular knowledge of humanitarian law serves the aim of the law – rules help to spread the idea that not everything is "fair in love and war". Moreover, as the law stipulates the rights and obligations of individuals, they must have access to the texts of the Conventions. Since they can not be presumed to be fluent in English or French, which are the authentic languages of the Conventions, the Conventions must be translated into the national language of every state party.[4] This obligation inarguably calls for action form states. Furthermore, compliance with this obligation allows the fulfilment of many others as well, for example, making the Conventions available in prisoner-of-war camps in the prisoners' native language.[5]

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[3] Geneva Convention I, Article 27; Geneva Convention II, Article 48; Geneva Convention III, Articles 41 and 127; Geneva Convention IV, Articles 99 and 144.

[4] Common Article 48/49/128/145 of the Geneva Conventions.

[5] Geneva Convention III, Article 41.

Estonian translations of the Conventions were published in 1999 in the State Gazette.[6] Careful reading of the Estonian texts reveals quite a few errors of translation. Nevertheless, the translations are by and large understandable and are available to the public; they have also been duly forwarded to the depositary.

Careful reading of Common Articles 48/49/128/145 of the Conventions suggests that not only the Conventions themselves, but all the national implementation acts must be translated and forwarded to the depositary. Some authors even argue that even the preparatory works for the Conventions should be translated into national languages, to allow thorough interpretation for those unable to understand English or French.[7] While doubtless very useful, this would probably be overly time and resource consuming for public administration.

Knowledge of the Conventions must be spread as widely as possible both within the armed forces and the general population. This is described in the Conventions as an

> obligation to undertake, in time of peace as in time of war, to disseminate the text of the Conventions 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 be known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.[8]

Estonia is not in full compliance with this obligation. To begin with, there are no legislative acts concerning the dissemination of humanitarian law. However, basic rules of humanitarian law are taught to military officers at Estonian National Defence College; pre-mission training of military personnel also involves instruction in humanitarian law. During compulsory military service, on the other hand, conscripts only receive a few classes in humanitarian law. The law is not taught on a regular basis to police officers, boarder guard officials or rescue workers. Yet, all of them should receive some training because humanitarian law stipulates rights and obligations to those groups of people under certain circumstances (e.g. while participating in civilian defence works or in international missions).

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6 For publication details, see note 1 above.

7 **H. Vallikivi.** 2001. Välislepingud Eesti õigussüsteemis: 1992. aasta põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus. Tallinn: Õiguskirjastus, lk 106.

8 Geneva Convention I, Article 47; Geneva Convention II, Article 48; Geneva Convention III, Articles 41 and 127; Geneva Convention IV, Articles 99 and 144.

As for the civilian population, humanitarian law is taught at the Faculty of Law of the University of Tartu and at the Institute of Law of the Tallinn University of Technology. The Estonian Red Cross has done some work on disseminating humanitarian law, but it has often reached only a limited audience. Some years ago a teaching programme for high schools was launched; a teachers' handbook has been translated into Estonian. The Martens Society, a non-profit organisation, has also contributed lately by organising seminars and conferences on international humanitarian law as well as translating a few essential materials into Estonian.[9]

All in all the dissemination of humanitarian law should be taken more seriously in Estonia – not only are all states parties under a formal obligation to do so, but it is also in everyone's best interest. The principle *ignorantia iuris non excusat* applies here as it does in national law. If soldiers or even police officers are not familiar with the rules of international humanitarian law, the burden under certain circumstances may easily fall upon the individual or state. Lack of education in the armed forces can lead to devastating mistakes on the battlefield. It is unthinkable of course to require all officers to have law degrees. However, people who have been specially trained in the field of humanitarian law should be appointed to the armed forces. Such lawyers must be available when an officer is making difficult decisions concerning the use of force in an armed conflict.[10]

3. Administrative Measures

In a broader sense, all persons who fall into the hands of the enemy are protected persons. But certain individuals, such as medical and religious personnel and the staff of civil defence organisations enjoy special protection.[11] States who are party to a conflict must ensure that these persons are identifiable, particularly by means of special emblems.[12] Some objects are also

[9] In particular, **F. Kalshoven & L. Zegveld.** 2007. Sõjapidamise piirangud: sissejuhatus rahvusvahelisse humanitaarõigusesse. Tartu: Tartu Ülikooli Kirjastus; **J.-H. Dunant.** 2009. Solferino mälestus. Tartu: Tartu Ülikooli Kirjastus.

[10] Protocol Additional (I) to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, in force 7 December 1978, 1125 UNTS 3 (in force for Estonia 18 July 1993 – RT II 1999, 21, 121), Article 82.

[11] **L. C. Green.** 2008. The Contemporary Law of Armed Conflict. Manchester: Manchester University Press, p 230.

[12] See for example Geneva Convention I, Articles 36, 38–42, 44, 53, 54; Geneva Convention II, Articles 39, 41–45; Geneva Convention IV, Articles 18, 20–22, 56; Additional Protocol I, Articles 8, 18, 23, 37, 38, 85.

entitled to special protection. These objects include, for example, cultural property, as well as military medical facilities and ambulances. These objects must also be properly marked. While the armed forces can issue armbands to medical personnel during the conflict, the marking of specially protected cultural property should already be done during peacetime.

As will be discussed below, the marking of medical persons and property with the protective Red Cross emblem is regulated in Estonia by law. The marking of cultural property is a bit more problematic, but a lot of work has been done in this regard lately. A special joint commission of the Ministry of Culture and Ministry of Defence was formed in 2005 to implement the protocols to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[13] (The ICRC suggests that such commissions be formed for the overall implementation of international humanitarian law. Many states, for example Finland, Lithuania, Sweden and Germany have done so and it has proven effective.[14])

The Penal Code criminalises attacks against protected persons, non-military objects and cultural property. Civil defence workers are also protected by the code, but there are no provisions concerning their identification in any other legislative act.[15] In Estonia there are in fact no provisions at all that concern civil defence, other than the one penal code provision in at all. The protection of journalists covering armed conflicts[16] is also not regulated in Estonia.

Prisoner of war status and confinement are not regulated by national law. This is quite regrettable, since it is a lengthy set of provisions that can not be implemented overnight. The Penal Code contains just two provisions concerning prisoners of war that ensure liability in cases of maltreatment.[17]

States are also encouraged to establish national Red Cross Societies, civil defence organisations, National Information Bureaux and other such organisations.[18] This is a set of rules that certainly needs to be acted upon by the states who subscribe to the Conventions. It is the prerogative of each

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[13] Formed by a directive of the Minister of Culture on 21 September 2005.

[14] **ICRC.** 2011. National Committees and Other National Bodies on International Humanitarian Law. 31 October. <www.icrc.org/eng/assets/files/other/national-committes-icrc-30-10-2011-eng.pdf>.

[15] Karistusseadustik [Penal Code], 6 June 2001, in force 1 September 2002 – RT I 2001, 61, 364 ... RT I, 29.12.2011, 190.

[16] Additional Protocol I, Article 79.

[17] Penal Code, sections 98, 99.

[18] Geneva Convention I, Article 17; Geneva Convention III, Articles 120, 122 and 123; Geneva Convention IV, Articles 136–141.

State to choose the best way of doing so. For example, the duties of these organisations can either be divided up between the different ministries, or independent organisations can be formed. The civil defence is a good example – in many states it is part of the general rescue service and works as a civil defence organisation only during times of war. Red Cross Societies are examples of important, autonomous organisations that can play a major role in the overall implementation and compliance with humanitarian law.

The Estonian Red Cross was formed in 1919. This is an organisation with a long history and many tasks, but remains the only organisation provided for in humanitarian law, that has been formed in Estonia. It is a non-governmental organisation and as such differs from other organisations described below that should be organised by state powers.

A separate civil defence organisation does not exist in Estonia, nor is there a National Information Bureau. The latter is a central agency that deals with the identification of the wounded and sick. A graves registration service is also stipulated by the Conventions, but does not exist in Estonia.[19] In addition States are encouraged to provide for the establishment of hospital zones, neutralised zones, and demilitarised zones[20]. It is a question of careful consideration whether such zones and organisations should be established in peacetime or after a conflict has already broken out.

States have an imperative to take international humanitarian law into account when selecting military sites and developing military tactics.[21] According to Additional Protocol I "The Parties to the conflict shall, to the maximum extent feasible … avoid locating military objectives within or near densely populated areas".[22] This is done to protect the civilian population from direct or collateral damage. While not the biggest issue for Estonia, some remarks are worth considering. For example, military bases or other significant defence structures (e.g., the Ministry of Defence, the headquarters of the Defence League) should not be located in densely populated areas or near an immovable cultural property (e.g. the Old Town of Tallinn).

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[19] A war graves protection act has been adopted, but this only includes the graves of those who fought for Estonia's independence in the 1918–1920 war and the period that followed. See Sõjahaudade kaitse seadus [War Graves Protection Act], 10 January 2007, in force 20 January 2007 – RT I 2001, 4, 21.

[20] Geneva Convention I, Article 23; Geneva Convention IV, Article 15; Additional Protocol I, Articles 59 and 60.

[21] Additional Protocol I, Article 36 and 58.

[22] Additional Protocol I, Article 58(b).

4. Penal Measures

States who are party to the Conventions, Protocols and other humanitarian law instruments must prevent and put an end to acts contravening these instruments. In short, states must repress all violations and, in particular adopt criminal legislation for the punishment of those who commit grave breaches of the Conventions.[23] Article 129 of Geneva Convention III states: "the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."

Chapter 8 of the Estonian Penal Code covers war crimes. Crimes listed in this chapter do not fully correspond to those under international law but an effort has been made to at least describe and prohibit the core war crimes.[24] There is also a special saving clause which states that offences committed in war time which are not listed as war crimes are punishable on the basis of other provisions of the special part of the Penal Code.[25] While it is useful, the clause can lead to a situation where a war crime may be perceived as an ordinary, and therefore less serious, crime under Estonian legislation.

Another interesting interaction between national and international law is the principle of non-retroactivity. Section 2(1) of the Penal Code stipulates that: "No one shall be convicted or punished for an act which was not an offence pursuant to the law applicable at the time of the commission of the act". But in international law non-retroactivity is not that strict. For example, the war crimes tribunals in Nuremberg and Tokyo had to first define the crimes they were prosecuting, they were not yet working with an established law.

This is generally allowed in international criminal law in connection with crimes against humanity and war crimes. In compliance with this trend, the Estonian Supreme Court has decided that the principle *nullum crimen sine lege* does not apply when an act is a crime under international law and

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[23] Common Articles 50, 51, 130 and 147 of the Geneva Conventions; Additional Protocol I, Article 11, 85 and 86; **L. Hannikainen, R. Hanski & A. Rosas**. 1992. Implementing Humanitarian Law Applicable in Armed Conflicts: The Case of Finland. Dortrecht: Martinus Nijhoff, p 114.

[24] In detail see: **R. Liivoja, R. Värk & M. Kastemäe.** 2005. Implementation of the Rome Statute in Estonia. – Finnish Yearbook of International Law, Vol. 16, pp. 79–101.

[25] Penal Code, section 94(1).

becomes criminalised nationally only after the commission of the act.[26] This might cause problems with legal certainty on the national level, especially in the light of the broad language used in the provisions defining war crimes in the Penal Code.

States must also adopt measures to prevent the misuse of the Red Cross, the Red Crescent, and other civil defence emblems. Correct usage of those emblems and protection of objects and persons marked with them is what makes achieving the goals of humanitarian law possible. Contemporary international humanitarian law is based on the idea that people who help others in times of conflict, should be properly identified, protected and allowed to do their work.

Estonia has an Act of Parliament concerning the use of Red Cross and Red Crescent from 2006. The Act deals with the wrongful usage of the emblems in a satisfactory manner.[27] The Penal Code stipulates that misuse of those emblems during wartime can result in up to three years of imprisonment.[28] Unfortunately, the use of the emblem of civil defence organisations is not regulated by Estonian law, although some states have integrated this in the same acts as are used to regulate the usage of Red Cross symbols (e.g. Finland, Sweden, Canada).

5. Conclusion

Humanitarian law advocates regularly deal with the challenges of implementing the law. People of a more practical bent may ask whether it is worth to implement rules that seem necessary only in times of war. When resources are scant it is difficult to justify the means necessary to prepare for some (unlikely) future risks.

When implementing humanitarian law every state must take into account its recent history and the overall state of affairs of the world at large. Although international armed conflicts are not that common anymore, humanitarian law also applies to non-international conflicts (and to some extent to new forms of war) which are occurring in many parts of the world and can start virtually overnight.

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[26] *Criminal matter of Vladimir Penart*, Case No. 3-1-1-140-03, National Court of Estonia, decision, 18.12.2003, para. 10.

[27] Punase risti nimetuse ja embleemi seadus [Red Cross Designation and Emblem Act], 5 April 2006, in force 1 June 2006 – RT I 2006, 18, 141 … RT I, 08.07.2011, 46.

[28] Penal Code, section 105.

Implementing many of the provisions of international humanitarian law would be without doubt very expensive for Estonia, but there are some things that could be done at a relatively small cost. A Humanitarian Law Commission should be established to analyze all of Estonia's obligations. Through its Advisory Service, the International Committee of the Red Cross also provides advice and documentation to governments regarding national implementation. Raising the overall awareness of the need of implementation should be the first step.

Treaties

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, in force 21 October 1950 – 75 UNTS 31 (in force for Estonia 18 July 1993 – RT II 1999, 17, 107).

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, in force 21 October 1950 – 75 UNTS 85 (in force for Estonia 18 July 1993 – RT II 1999, 18, 116).

Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, in force 21 October 1950 – 75 UNTS 135 (in force for Estonia 18 July 1993 – RT II 1999, 19, 117).

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War], 12 August 1949, in force 21 October 1950 – 75 UNTS 287 (in force for Estonia 18 July 1993 – RT II 1999, 20, 120).

Protocol Additional (I) to the Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, in force 7 December 1978, 1125 UNTS 3 (in force in Estonia 18 July 1993 – RT II 1999, 21, 121).

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