



## HUMANITARIAN ACTION AND LIABILITY FOR IHL VIOLATIONS

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### Outline of the intervention

Any humanitarian action implies respect for IHL as reflected in the Geneva Conventions and their Additional Protocols, as well as in customary international law as developed before the Geneva law, as it is the case of the Hague law, or alongside the GCs and Protocols, as it is e.g. the case of the grave breaches regime that the Geneva law provides only for international armed conflicts, and has been extended under customary IL to non-international armed conflict by the case law of international criminal courts, in particular by the *Tadić* jurisprudence of the ICTY.

What has been achieved in promoting the respect for IHL in terms of *preventive action*? As the ICRC Commentary to the 1965 Fundamental Principles indicates, “in the legal field, prevention calls for the work of developing IHL”. In other terms, fundamental prevention activities consist in developing, extending and disseminating IHL. In this context, an important role lies with the teaching and dissemination of IHL carried out by States’ military academies, by the ICRC and national societies, or private institutions. I am proud to mention here the teaching and dissemination activities that the IIHL of San Remo, which I represent, has promoted and carried out through more than 45 years, as well as its contribution to the development of IHL with its military manuals well known worldwide.

However, preventive action aiming at the respect for IHL should also imply an *effective control on its respect* by the actors – States and non-State actors – engaged in armed conflicts, including a control aimed at preventing violations and at repressing them efficiently immediately after their commission, through a prompt trial of the perpetrators directed at assessing and declaring their individual responsibility for such violations, in particular when they constitute war crimes.

A significant achievement has been reached in the last decades through the establishment of a variety of international criminal courts, as well as special domestic criminal courts with international participation and support, whose main objective has been to fight impunity through the assessment of individual criminal liability for war crimes, i.e. for violations of IHL. However, have these courts succeeded in strengthening humanitarian action, by ensuring a preventive action in armed conflicts?

It would be difficult to give an entirely affirmative answer. This is only partly due to the fact that criminal justice is an important instrument for restorative action rather than for preventive action. Indeed, the role of preventing violations by discouraging potential perpetrators from committing crimes is a significant feature of criminal justice. However, in order to play this role, criminal justice must be effective and perceived as just and not as unduly delayed. If we look at the courts established so far, it is clear that justice has been frequently seen as unduly delayed, and in many

cases has been not sufficiently effective. The examples of the cases referred to the ICC by the Security Council, and of the cases that should have been referred and were not, are telling. Thus, in order to ensure that international criminal justice performs its function also as an instrument for preventive action, it is necessary to strengthen its role by ensuring that it enjoys the full and continuous support of the international community. As it is now, its contribution to preventive action lies essentially, or at least primarily, with the clarification of the law, as mentioned earlier.

In order to achieve such a result, i.e. to reach a system of international criminal justice with an effective impact on the commission of future violations of IHL, a significant contribution should be given through the establishment of mechanisms for an early monitoring of the violations, such as it has been suggested e.g. by the ICRC last year and could be finalized in future meetings. An early monitoring of the violations would have not only a preventive role in itself, but would also pave the way to strengthening the preventive function of international criminal justice.