UNIT 19 WHAT IS THE ROLE OF OTHER ORGANISATIONS IN SOUTH ASIA?

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19.1 INTRODUCTION

In the expression of other organisations, we will discuss the "Military Law Mechanism" for international humanitarian law implementation.

As we know that IHL refers Protocols 1977, together with other rules designed to ensure protection and respect of human beings in armed conflict. Implementation covers all those measures which must be taken to ensure that the provisions of IHL are fully respected. In other words we can say, implementation humanitarian law means putting this law into effect.

International humanitarian law (IHL) consists of international prescriptions on the conduct of combat and protection of victims of combat. Very important point with regard to IHL is that treaties themselves provide for a number of ways and means aimed at ensuring that their rules are observed if the situation requires their application.

Implementation of IHL may be carried out by the legal process by means of control and sanctions.

Military Law plays an active role in prevention by dissemination, designing regulatory measures, and by framing of desired rules and orders to ensure respect and adherence to IHL.

19.2 OBJECTIVES

After reading this unit, you should be able to:

- describe the Process of Implementation of IHL in Military organisation; and
- discuss the role of military Law Advisers.
19.3 THE PROCESS OF IMPLEMENTATION OF IHL

We look into the process for implementation in this chapter.

Generally, the process of implementation involves keeping a close watch not only on methods and means of warfare in order to assess their consequences in humanitarian terms, but also, on other developments that have a bearing on IHL. We can say, to prepare for the adoption, whenever necessary, of the new rules of that law.

These measures designed to assist other states to respect the law. It is obvious, that, these measures will assist particularly in peacetime, which may include providing legal advisers to assist in developing or adapting national legislation and penal coded for effective implementation of IHL.

It also assists to train legal advisers within the armed forces, teaching IHL as part of military co-operation, and so on.

When we say to respect for the law of war, it is a matter of order and discipline. A commander is required to assure that his subordinates are award of their obligations under the IHL and that they respect them.

Additionally, we can say, the commander is expected to make sure that violations of the law of war cease and ensure that disciplinary or penal action is taken.

19.4 MILITARY LAW ADVISERS

Now, when we say, expert of military law, they are expected to assume the role of qualified training personnel. The High Contracting parties are called upon, during peace time, to train qualified personnel to facilitate the application of conventions and Protocols and in particular the activities of protecting powers.

These advisers may be employed to ensure that IHL provisions are not overlooked. They can be used to advise, instruct the commanders besides participating in general dissemination activities.

When we emphasising on legal advisers, the provision is Article 82 of Protocol I, the High Contracting parties at all times, shall ensure that legal advisers are available, to advise military commanders at the appropriate level on the application of the conventions and this Protocol and on the appropriate instruction to the armed forces on this subject. Obvious, this observation should be at that time when it is necessary.

We can articulate that it becomes the duty of the government concerned to utilise the services of legal advisers.

Duties legal advisers, superior commanders

This, we can say, another area in which the services and commanders stems from Article 86, Para 2 of Protocol I.

If we look the text, it is like, “The fact that a breach of the conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal, or disciplinary responsibility as the case may be, if they knew, or had information which should have enabled them to conclude, in the circumstances at time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”
The officials of the Military legal department may be assigned a role together, i.e. to provide relevant information and provide legal opinion with regard to allegations about breaches.

The military commanders may also be tasked to organize consultations with experts to monitor and foster debate on the evolution of humanitarian issues.

The military commanders may rely mainly on the observations in the field to work on factual data. The role of military law, we can say, towards IHL implementation falls under the category of ‘national measures’.

The significance should be attached to imparting education to members of the armed forces rather than adopting coercive methods for law compliance. An educated soldier is less prone to commit breach of the conventions than a soldier who is ignorant about them. Military law experts have been actively associated in study on customary rules of IHL. These experts have focused their attention on efforts directed to prohibition of Anti-Personnel Land Mines, 1980, Conventional Weapons Convention, and the 1998 Rome Statute on the International Criminal Court, (ICC).

19.5 PENALTY OF GRAVE BREACHES OF IHL

Particularly, grave breaches of IHL may be described as acts which constitute violations of the GC or Protocols are defined as grave breaches by these treaties. When we say grave breaches, it is obvious, that it should be focused on Articles 50, 51, 130, and 147 of the four Geneva Conventions of 1949 respectively, as well as Articles 11, Para 4 and 85 of Protocol I.

These above mentioned Articles are consists of attacks against the life or the physical integrity of persons protected by the conventions of 1949. Grave breaches of humanitarian law are assimilated to war crimes.

If we see profundity, there are number of indirect modes in which military law provisions can be invoked to facilitate implementation of IHL. These provisions may be illustrated by the different contingencies where recourse to the Army Act, 1950. If we see, an order from a superior commander to his subordinate to conduct classes aimed to disseminate IHL syllabi will be a lawful command, disregard to which may constitute disobedience of lawful command.

Similarly, an omission on the part of a student to attend such a class will amount to a culpable act of being absent without leave. The violations of breaches, other than grave breaches, would be punishable under Section 63 of the Army Act that concerns an act or impropriety prejudicial to good order and military discipline.

Self Assessment Question
1) Write the main provisions relating to grave breaches at Geneva Conventions 1949.
Now we will focus on the military law in India, to implement IHL.

As we know, that, India has maritime boundaries with Bangladesh, Malaysia, Maldives, Myanmar, Pakistan, Sri Lanka and Thailand.

We also know, there have been a number of wars fought on the Indian subcontinent since it attained independence fifty-five years ago. And casualty figures of the two opposing sides during these armed conflicts and the proxy war exceed millions.

So we can say Indian armed forces have a visible and real concern for understanding and adherence to the conventions and Protocols.

The Indian parliament has legislated the Geneva Conventions Act in 1960 pursuant to the constitutional sanction to give effect to the treaties and conventions to which India was a party. And as a result of this, the principles of IHL have been incorporated into the law of the country and the conventions form an integral part of Indian law.

If we look Section 7 of the Act, 1960 is relevant for the purpose of military law. It provides, 'The Army Act, 1950, the Air Force Act, 1950 or the Navy Act, 1957, relating to trial by court martial of persons who commit civil offences shall have effect for the purpose of the jurisdiction of courts martial as if this chapter had not been passed'.

If we observe the Military law, it mainly comprises of the Army Act, 1950, the Air Force Act, 1950 and the Navy Act, 1957. The basic framework of these enactments is almost identical. In addition, the Ministry of Defence exercises operational control over the Assam Rifles and the Coast Guard which is regulated by the Coast Guards Act, 1978.

If we notice the Central police Organizations commonly referred as the Central Paramilitary Forces (CPMF) are represented by the Border Security Force (BSF), Central Industrial Security Force (CISF), Central Reserve Police Force (CRPF), Indo-Tibetan Border Police (ITBP), and the National Security Guard (NSG), each of these components functions under their own statute.

If we study the constitution of India, Union list of the Seventh Schedule, which recognizes other, armed forces of the Union. The Human Rights Act, 1993, defines armed forces to include ‘other armed forces of Union’.

During the war, the CPMF, when deployed on borders or in war affected areas may be placed under Army’s operational control and would then be treated as assimilated to armed forces. In a limited way in the western and northern sectors, along the line of control, paramilitary forces have been deployed for a long time under Army’s operational control. In such situations they are obliged to comply with IHL provisions as their soldiers assume the status of combatants under law of war.

A significant feature of the military law relates to concurrent jurisdiction. Even combatant is subject to the provisions of law framed for his service. And at the same time he does not cease to be subject to the law of the land which applies to the others and to common citizens. If we see the Section 69 of the Army Act, which provides for trial and punishment of any person subject to the Army Act, for commission of any civil offence. The said Section itself provides for trial of civil offences. By virtue of this Section, any civil offence which is triable by a criminal court is akin to an offence under the Army Act. And therefore a grave breach of the conventions, if it amounts to an offence under any other penal law, can made a subject-matter for a trial by court martial.
Military law and criminal justice delivery system

Military law provisions present a practical and effective mechanism to ensure implementation of law of armed conflict. The utility of military law and its efficacy single it out as an effective mode to enforce the IHL.

This can be made use of both in a direct manner and also by implication or in an indirect mode. It emerges as a potent and simple tool for fair, prompt, and inexpensive disposal of cases pertaining to IHL violations. Military tribunals are characterized by speedy and impartial trials. They provide a wide variety of rules to cater for diverse situations, say for disregarding grave breaches liable to attract award of death penalty, or matters warranting joint trial of a large number of offenders. As regards prevention and detection of crime, military law apparatus recognizes the presumption of innocence and the right to a fair trial. The right to privacy is also suitably enshrined.

When we talk about a trial by court martial, it is invariably economical. The witnesses are unlikely to be influenced, or intimidated. Generally, they are rarely turned hostile. It has elaborate procedures for the pre-trial detention and subsequent confinement within the military structure in the form of detention cells, and military prisons. It has a unique advantage of presenting a correctional facility where convict is kept away from the possibility of becoming a hardened criminal in the company of jail inmates.

Usually a civilian may not find himself in a position to commit a war crime. The breaches would relate to situations of armed conflicts, or to actual war. Nuances of evidence pertaining to matters like command responsibility, military necessity, or use of excessive force may not be easily appreciated and understood by civilian judges unfamiliar with military ethos.

Military law as one of the law enforcement agencies, is strictly hierarchical and a closed system. As an organisation it usually operates under a rigid chain of command with strict separation of power and authority. The decision making process are of the ‘top down’ variety.

Apprehension is sometimes expressed about the fairness of military law mechanism to prosecute IHL violations. Such fear is based on the ground of protectionism. It is argued that protection afforded by Section 45 and 197 of the criminal procedure code may shelter the men in uniform from being called upon to answer charges of criminal prosecution.

Such a fear was discounted by the Supreme Court in Naga people’s case.

The court only gives protection in the form of previous sanction of the central government before a criminal prosecution, or a suit, or other civil proceeding is instituted, against such a person. It has to be borne in mind that discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where discretion is vested in the government and not in a minor official.

While holding trials, the necessity to conceal and protect the identity of victims, or military tactics can ensured. The results are different when trials are held in the civilian courts. For example, in regard to allegations about atrocities by the BSF, it was remarked, ‘a large number of cases have been registered against BSF personnel for having taken part in encounters or killed people. Whenever we have been able to identify civilians or militants, adequate action has been taken. It is the weakness of the criminal justice, administration system- that they are not able to quickly bring them to justice, or to punish them the way we would like.'
If we see the Article 91 of Protocol I envisage the concept of payment of compensation. It provides: ‘A party to the conflict which violates the provisions of the conventions, or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces. Thus, quasi-civil sanctions may be imposed on a state to pay compensation for the damage it has caused. Recourse to order payment of compensation is meant to complement the mechanism of penal prosecution.

The supreme court of India in the Naga people’s case paved the way for initiation of criminal action against the offenders while simultaneously giving monetary relief to the victims.

International committee of the Red Cross endeavours to provide protection and assistance for victims of armed conflict. The process of national implementation involves a constructive and continuing debate amongst the representatives of various ministerial, civil defence bodies, academicians, and other interested groups like media, and NGOs.

The meetings are generally held in close cooperation with the ICRC and the national societies. This facilitates progress towards domestic legislation to implement the LOAC.

Now, we can say that the Indian armed forces have taken concrete steps for implementation of the dissemination of knowledge on international humanitarian law by making it an essential component of the basic training given to each and every soldier.

Self Assessment Question
2) Explain Article 91 of the Protocol I.

19.7 PROTECTION OF EMBLEM

According to the IHL provisions the use of the emblems of Red Cross or Red Crescent outside the conditions provided for by the humanitarian law is forbidden. Military law provides authority to the commanders to introduce legal measures for protection of the emblem of the Red Cross and Red Crescent.

19.8 IHL TRAINING FOR MILITARY PERSONNEL

Military law is inextricably linked to humanitarian law in the matter of training for the defence forces. Directors of military training of nearly all countries in South Asia have sought the expertise of the ICRC to structure their training programmes. National seminars, workshops, and capsules are organized to encourage greater awareness of the IHL.

The Institute of Military Law (IML), Kamptee, near Nagpur acts as the nodal training centre for training in LOAC. Under the overall guidance of the Judge Advocate General suitable exposure is given to the IHL contents in the training courses and promotion exams. Military law journal, a bi-annual publication brought out by the IML carries Articles on issues relevant to the law of war.
Ameliorative Mechanisms

It carries out a singularly significant function of collection and analysis of all information relating to new legislation and case-law. One of the steps presently under active consideration of the JAG’s department is production of a training film to propagate the essential message of IHL.

Generally, all soldiers deployed in the disturbed areas are expected to carry the one page manual in their pocket. They are duty-bound to abide by its contents in letter and spirit.

The Supreme Court had commented on its legality in *Naga People’s case*.

When rules themselves do not contain any guidelines, directions, or criteria, the instructions issued by the government furnish an essential and statutory procedure for the purpose of securing uniformity in application of the rules. These instructions really fill up the yawning gaps in the provisions and are embedded in the conditions of service. These are the binding on the government and cannot be violated to the prejudice to the government servant.

### 19.9 RECOMMENDATIONS

A number of steps may facilitate implementation of IHL to be more effective. The suggested recommendations listed below may bring about overall refinement of military law as an option for the prosecution of IHL violations:

Law governing the Army, Navy, and the Air Force could be suitably amended so that effective penalties are prescribed by way of penal sanctions for breaches of the conventions by bringing them within the list of military offences. Appropriate provisions should be inserted in the model law to be drafted, so that such breaches could relate to the offences with regard to refugees, hostages, and civilians, etc. an omnibus *Section* could be inserted to cover breaches of Geneva Conventions and the *Protocols*. The heading of such a *Section* may read as violations of IHL provisions.

Specific penalty should be allotted for each of the grave and other breaches. The punishments laid down for various breaches should have a similarity as regards those suggested by the conventions and also in the national legislations enacted by various states for uniform implementation of humanitarian laws.

More precise and common rules relating to attempt, abetment, and conspiracy need to be adopted.

The training of the armed forces in IHL should be given an added emphasis. IHL is applied by soldiers from the highest rank of the general down to the lowest sappy.

Dissemination should be carried out in national languages and the texts translated in Hindi so that they can be applied by the population and be easily understood.

The ICRC advisory service could play a coordinating role in this regard. Particular care needs to be taken with regard to the drafting of the text. These manuals would present an opportunity to include national interpretations of various issues. Military lawyers would then be able to suitably advise commanders at the appropriate level on the application of conventions, and about the laws of armed conflict.

### 19.10 SUMMARY

- Generally, the process of implementation involves keeping a close watch not only on methods and means of warfare in order to assess their consequences.
inhumanitarian terms, but also, on other developments that have a bearing on IHL.

- Military advisers may be employed to ensure that IHL provision are not overlooked. They can be used to advise, instruct the commanders besides participating in general dissemination activities.

- Grave breaches of IHL may be described as acts which constitute violations on the GC or Protocols are defined as grave breaches by these treaties. When we say grave breaches, it is obvious, that it should be focused on Articles 50, 51, 130 and 147 of the four Geneva Conventions of 1949 respectively, as well as Articles 11, Para 4 and 85 of Protocol I.

- The Indian parliament has legislated the Geneva Conventions Act in 1960 pursuant to the constitutional sanction to give effect to the treaties and conventions to which India was a party. And as result of this, the principles of IHL have been incorporated into the law of the country and the conventions form an integral part of Indian law. Military law also provides authority to the commanders to introduce legal measures for protection of the emblem of the Red Cross and Red Crescent. Directors of military training of nearly all countries in South Asia have sought the expertise of the ICRC to structure their training programmes. National seminars, workshops and capsules are organised to encourage greater awareness of the IHL.

19.11 TERMINAL QUESTIONS


2) In your opinion what should be done to implement IHL smoothly?

19.12 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 19.5

2) Refer to Section 19.6

Terminal Questions

1) Refer to Section 19.4 and 19.6

2) Refer to Section 19.9

19.13 GLOSSARY

LOAC : Law of War or Law of Armed Conflict

19.14 REFERENCES AND SUGGESTED READINGS
