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**Non-Compliance with International Norms –  
The Geneva Conventions of 1949 and the  
Vietnam War**

*Master's Thesis*

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## **Declaration of Authorship**

1. I hereby declare that I have compiled this thesis independently, using only the listed resources and literature.
2. I hereby declare that all the sources and literature used have been properly cited.
3. I hereby declare that the thesis has not been used to obtain a different or the same degree.

In Prague

Kristýna Kunovská

## **References**

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## **Abstract**

This thesis addresses the issue of non-compliance with international norms, namely the Geneva Conventions of 1949, in the context of the Vietnam War. It inquires into why parties to the conflict did not abide by these international norms. Non-compliance is discussed here from three perspectives: the state level, the communal level, and the structural level. I argue that at each of these levels, an environment for non-compliance was created, in connection with factors such as ambiguity in treaty language, unwillingness to respect the rules, inadequate reaction from the international community, and insufficient means to enforce the norms.

## **Keywords**

Geneva Conventions of 1949, international humanitarian law, Vietnam War, non-compliance, international norms

## **Title**

Non-Compliance with International Norms – The Geneva Conventions of 1949 and the Vietnam War

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# List of Abbreviations and Acronyms

**Geneva Conventions** – Geneva Conventions of 1949

**I. Geneva Convention** – Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949

**II. Geneva Convention** – Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949

**III. Geneva Convention** – Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949

**IV. Geneva Convention** – Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949

**ICRC** – International Committee of the Red Cross

**ICJ** – International Court of Justice

**IHL** – International humanitarian law

**NLF** – National Liberation Front of South Vietnam

**North Vietnam** – Democratic Republic of Vietnam

**Protocol I** – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977

**Protocol II** – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed, 8 June 1977

**Protocol III** – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005

**South Vietnam** – Republic of Vietnam

**US** – United States



## Methodology and Research Target

This thesis focuses on examining the reasons that prompted the parties to the Vietnam War to act in violation of the Geneva Conventions of 12 August 1949 (“Geneva Conventions”), to which they were bound according to the International Committee of the Red Cross (“ICRC”).

The research question is defined as follows: Why did the attempts to ensure compliance with the Geneva Conventions fail?

For the purposes of my work, I will apply a qualitative approach and make observations via single-case-study analysis. To address the research target, the causes of non-compliance will be looked at from three perspectives, or levels—individual (parties to the conflict), communal (international community), and structural (law enforcement, maintenance, and control).<sup>6</sup> The added value of the division into these three groups is the consideration of substate dynamics.

Based on the above-mentioned information and prior evidence, a tentative answer to the research question is formulated into the following hypothesis:

*H: Non-compliance with the Geneva Conventions was caused by a combination of factors stemming from the individual, communal, and structural levels.*

# I. Introduction

The Vietnam War, sometimes also referred to as the “Second Indochina War,” refers to a conflict which historians usually date from 1955 to 1975. The conflict began in Vietnam and spilled over to Cambodia and Laos. Fighting on one side was the Democratic Republic of Vietnam (“North Vietnam”), and an insurgency movement called the National Liberation Front of South Vietnam (“NLF”), supported by communist allies; on the other side was the Republic of Vietnam (“South Vietnam”), supported by the United States (“US”) and other allies.

Once an armed conflict starts, international humanitarian law, or the “Law of War,” should apply. Its main purpose is to limit the effects of such a conflict by protecting persons not actively participating in hostilities, by restricting and regulating the means and methods of warfare.

According to the ICRC, which acts as a guardian of international humanitarian law, the law’s regulations as a whole also undoubtedly applied to the Vietnam War. The ICRC was particularly referring to the four Geneva Conventions of 1949, which represented one of the most significant legal advances for humanitarian protections during war. They make provisions for the benefit of civilian and military victims of war in the event of an armed conflict of international character between two or more signatory states, and they set minimum standards to be respected even in case of an armed conflict of non-international character.

Parties to the conflict held different views on this appeal made by the ICRC. While South Vietnam and its allies agreed to the application of the Geneva Conventions in the Vietnam War, North Vietnam and the NLF refused. Nevertheless, soon it became known that the Geneva Conventions were being violated by all parties to the conflict.

As treaty and customary law provisions set limits to the waging of war, the single biggest challenge facing international humanitarian law seems to lie in persuading parties to the conflict to comply with the rules by which they are bound. It is of crucial importance that these rules be effectively implemented and respected. Whenever they are complied with in good faith, they provide victims with the best protection that can be expected given the circumstances of war. The effectual application of these conventions in the Vietnam War could have undoubtedly led to an appreciable alleviation of the suffering endured by the Vietnamese population and by other persons taking no active part in the hostilities.

My aim in this thesis is to identify causes underlying the violation of the Geneva Conventions by the parties to the conflict. The focus lies on North Vietnam, the NLF, South Vietnam, and the US, since the military action of other states providing aid to South Vietnam (New Zealand and Australia) was—as far as it is known—limited and not particularly significant.

The question of non-compliance with international law is discussed in the thesis from three perspectives, as identified by Jacob K. Cogan: the state level (in this case South Vietnam, North Vietnam, the US, and the NLF); the communal level (the international community, including the ICRC); and the structural level (the Geneva Conventions and the matter of law enforcement and maintenance). To be identified are factors at each of these levels which may have created an environment for non-compliance with the Geneva Conventions in the Vietnam War. My investigation is premised upon the assumption that this instance of non-compliance with the Geneva Conventions was caused by a combination of factors stemming from all three levels.

The notion of “compliance” versus “non-compliance” can be seen as a full spectrum of state action. A state can comply with an obligation to varying degrees, e.g., sometimes abiding by it, sometimes violating it; likewise, the extent of the breach may vary. In this thesis, I am primarily interested in whether a particular norm of international law was violated, and the reasons why.

The work is based on primary source material (texts of treaties, declarations, and statements, including archival collections), as well as on secondary source material on the legal and political aspects related to non-compliance with the Geneva Conventions in the Vietnam War.

## **II. International Law and Non-Compliance with Obligations**

The actors of international law create and access treaties that regulate their mutual conduct. This gives rise to rights and obligations for the parties to these agreements, as they are involved in decision-making on the development and implementation of these agreements. The fulfillment of obligations under multilateral agreements by the contracting parties is crucial to safeguarding the effectiveness of international law in general and the common interest of all contracting states.

Although compliance with international law has been considered generally high, the associated endeavors and aspirations are not always respected.<sup>1</sup> As a result, many scholars have become interested in detecting the reasons and circumstances leading states to ignore the obligations arising from treaties and other sources of international law.

Similarly, as suggested above, this thesis investigates the conditions creating an environment for violation of international norms which states have voluntarily ratified and promised to honor. It is based on the premise that breaches of international law can occur at the state, communal, and structural levels.<sup>2</sup>

The following subchapters discuss various factors related to those three different levels, which experts in international law and international relations have identified as important elements potentially leading to the violation of international norms.

### **A. First Level: State Level**

The first level at which non-compliance occurs is at the state level. It has been argued that the extent to which states obey a treaty depends on their capacity or incapacity and desire.<sup>3</sup>

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<sup>1</sup> Henkin, Louis. *How Nations Behave*. New York: Columbia University Press, 1979. page 47. ISBN: 9780231047579.

<sup>2</sup> Cogan, Jacob K. *Noncompliance and the International Rule of Law*. *Yale Journal of International Law*. Vol. 31, page 194. 2006. Available at: <https://core.ac.uk/download/pdf/72839391.pdf>. Accessed 1/10/2021.

<sup>3</sup> *Ibid.*, 194.

International law is based—with exceptions, such as customary law—on state consent.<sup>4</sup> All governments give up some autonomy as well as freedom, accepting international law as the price of “membership” in international society and of maintaining relations with other states. Governments often pass laws that may not seriously hinder them, only to see such laws passed by others and perhaps also to accommodate domestic opinion.

Without the state's consent, no treaty would be binding.<sup>5</sup> This, on the one hand, preserves the power of states. They can protect their sovereignty and interests and decide which treaties to sign, ratify, and abide by. On the other hand, states’ sometimes-reluctant attitude towards international treaties causes obstacles to the international system and prevents effective joint action in situations requiring a high level of cooperation.<sup>6</sup> Consent is said to reduce the incidence of non-compliance by limiting the rules of international law to states that have agreed to them. Nevertheless, cases have been observed where states violated treaties to which they consented.

One of the reasons why states may not abide by treaties is their non-capacity. This form of non-compliance with international treaties is unintentional. Abram Chayes and Antonia H. Chayes define three situations associated with the non-capacity of states to comply with a treaty. The first is the ambiguity of treaty language, e.g., the use of general language allowing for multiple interpretations, the failure of treaty drafters to anticipate many possible applications, or the inability of the treaty to adapt to current issues.

Another circumstance for non-compliance is based on the state's inability to comply with the obligations of the treaty. This may be, for example, due to inadequate fiscal resources or technological assistance. Finally, the non-deliberate violation of international law can be associated with the temporal dimension of the changes in social and economic systems contemplated by regulatory treaties.<sup>7</sup> In these situations, although a state may have the desire to comply with a law, various obstacles make this desire difficult to realize.

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<sup>4</sup> Henkin, Louis. *International Law: Politics and Values*. New York: Springer, 1995. page 28. ISBN: 978-0-7923-2908-4.

Brierly, Leslie. *The Law of Nations: An Introduction to the Modern Law of Peace*. Oxford: Oxford University Press, 1963. pp. 51-54. ISBN: 9780198251057.

<sup>5</sup> Henkin, Louis, ref. 1, pp. 30-31.  
9780231047579.

<sup>6</sup> Guzman, Andrew. *The Consent Problem in International Law*. *UC Berkeley: Berkeley Program in Law and Economics*, 2011. page 5. Available at: <https://escholarship.org/uc/item/04x8x174>. Accessed 11/10/2021.

<sup>7</sup> Chayes, Abram and Chayes, Antonia H. *On Compliance*. *International Organization*. Cambridge: The Mit Press, 1993 47(2), pp. 188-194. Available at: <http://www.jstor.org/stable/2706888>. Accessed 15/10/2021.

However, non-compliance can also be intentional and based on cost-benefit calculations. The violator may take advantage of factual ambiguities, knowing that it could deny the violation because the uncertainties would reduce the responses to the violation. The uncertainties of “costs” thus raise the likelihood of a violation, in cases where the interpretation of the norm or obligation itself is not entirely fixed. The likelihood of compliance with an established, internalized rule with clear wording is higher than a rule that is questionable, controversial, susceptible to change, or outdated.

States may sometimes opportunistically disagree on interpretations. Since treaties often do not provide for the submission of disputes to impartial tribunals, the interpretation is a responsibility of states themselves and might therefore be based on short-term national interests.<sup>8</sup> State interests such as power, wealth, and security are of great importance when it comes to non-compliance with international norms.<sup>9</sup>

In addition to treaty formulation and interpretation, internalization of rules, and state interests, Andrew Guzman defines three other factors helping to determine states’ decision on whether to comply with a treaty: reciprocity, reputation, and retaliation. Scholars refer to a state’s decision to comply as a “form of exchange” – a state agrees to comply because another state is making a reciprocal commitment.<sup>10</sup> The key finding by James D. Morrow is that in the case of joint ratification of a treaty, a state is more likely to violate the laws of war when it is clear that the adversary has done so.<sup>11</sup>

A state’s failure to honor its commitment tends to harm its reputation, negatively influencing how it is perceived by other states.<sup>12</sup> The more serious the violation and the clearer the obligations, the worse the reputation of the violating state tends to become.<sup>13</sup> Although Guzman considers reputation a significant element (perhaps even the most important one), the importance of reputation declines when the stakes are high, because reputational effects have limited power. High stakes are, for example, those related to a state’s decision to use military force. In such

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<sup>8</sup> Shannon, Vaughn P. Norms Are What States Make of Them: The Political Psychology of Norm Violation. *International Studies Quarterly*, 2000, 44 (2), page 294. Available at: <http://www.jstor.org/stable/3013999>. Accessed 17/10/2021.

<sup>9</sup> Cogan, Jacob K, ref. 2, page 194.  
Henkin, Louis, ref. 1, page 73.

<sup>10</sup> Guzman, Andrew, ref. 6, page 5.

<sup>11</sup> Morrow, James D. When do States Follow the Laws of War? *The American Political Science Review*, 2007, 101(3), pp. 559-572. Available at: <http://www.jstor.org/stable/27644466>. Accessed 20/10/2021.

<sup>12</sup> Guzman, Andrew. A Compliance-Based Theory of International Law, 2002, 90(6), page 1861. Available at: <https://doi.org/10.2307/3481436>. Accessed 22/10/2021.

<sup>13</sup> *Ibid.*, 1861.

situations, costs and benefits in terms of acquired territory, access to resources, or greater security tend to be considerable. This makes it relatively unlikely that a state would take steps contrary to its interests as an effort to preserve its reputation.<sup>14</sup>

According to Guzman, another factor influencing a state's decision is the prospect of retaliation. Such pressure can be exerted by domestic courts, often in cooperation with international tribunals, or by the international community.<sup>15</sup> This is only considered feasible if the country is capable (has the capacity) to change its behavior to be in line with the agreement.<sup>16</sup>

States may also decide to reserve specific treaty proclamations to avoid non-compliance later. This is because reservations may be less costly than non-compliance. However, this does not mean that the state in question will never violate the treaty for which reservations were made.<sup>17</sup>

## **B. Second Level: Communal Level**

Non-compliance with international law is often rooted in more than one state's incapacities or unwillingness. The international community is believed to create background conditions which permit or create an environment for non-compliance. International law theorists conclude that in the absence of such conditions, some acts of non-compliance would never take place.<sup>18</sup>

The term “international community” is often considered somewhat ambiguous. No legal entity goes by this name. International relations and international law scholars have long attempted to provide the most precise definition for this expression, and many of their interpretations concur on certain points. For example, it is argued that the international community is created by a

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<sup>14</sup> Guzman, Andrew, ref. 12, page 1883.

<sup>15</sup> Phelan, William Phelan. Diagonal Enforcement in International Trade Politics, 2016, page 6. EUI SPS Working Paper. ISSN: 1725-6755. Available at: <https://ssrn.com/abstract=2733604>. Accessed 22/10/2021.

Guzman, Andrew, How International Law Works: A Rational Choice Theory. Oxford: Oxford University Press, 2010. pp. 134-135. ISBN: 978-0199739288.

<sup>16</sup> Van Aaken, Anne and Simsek, Betül. Rewarding in International Law. *American Journal of International Law*, 2021, 115(2), pp. 207-208. Available at: [doi:10.1017/ajil.2021.2](https://doi.org/10.1017/ajil.2021.2) Accessed 25/10/2021.

<sup>17</sup> Zvobgo K., Sandholtz W. and Mulesky S. Reserving Rights: Explaining Human Rights Treaty Reservations. *International Studies Quarterly*, 2020, 64(4). Available at: <https://doi.org/10.1093/isq/sqaa070>. Accessed 28/10/2021.

<sup>18</sup> Cogan, Jacob K, ref. 2, page 195.

unified society of actors which attach high importance to the same rules and identities and share the same views as well as opinions regarding moral behavior.<sup>19</sup>

To achieve their common goals, states often form organizations. Organizations constitute a place where the international community expresses itself. It is important to acknowledge these organizations—whether they are non-state entities, transnational corporations, or individuals—also as separate actors, rather than only as subunits of state action, since their role can be legally significant.<sup>20</sup> In the same vein, Bruno Simma argues that the international community transcends the interests of states as such and that instead, “it corresponds to the needs, hopes and fears of all human beings, and attempts to cope with problems the solution of which may be decisive for the survival of the entire humankind.”<sup>21</sup> Thus, the international community is considered to be an element to limit the political power of states, and to act independently to a great extent in international relations. This can be evident, for instance, in the promotion, socialization, and internalization of international norms, as in the norm life cycle.

International norms are created by “norm entrepreneurs” (an individual or group representing a state or non-state actor and driven by moral conviction), alongside the organizations they usually inhabit. The initial role of the norm entrepreneur is to persuade states to adopt new norms; it then proceeds to the stage of broad norm acceptance. However, some states may refuse to follow a norm. These states can be persuaded otherwise by an active process of international socialization, meant to induce them to change their behavior by adopting norms preferred by international society.<sup>22</sup> The role of “norm leaders” (states, networks of norm entrepreneurs, or international organizations) takes several forms at this stage, including teaching the new rules to relevant actors or collecting information about the violation and publicizing it as a means to pressure violators to conform. In the last stage of the norm life cycle, norms are so widely accepted that they are internalized by state actors, i.e., they come to be considered common sense, because their inherent value and importance are understood collectively.<sup>23</sup>

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<sup>19</sup> Ellis, David C. On the Possibility of ‘International Community’. *International Studies Review*, 2009, 11(1), page 4, Available at: <http://www.jstor.org/stable/25482041>. Accessed 28/10/2021.

<sup>20</sup> Crawford James R. Responsibility to the International Community as a Whole. *Indiana Journal of Global Legal Studies*, 2001, 8(2), pp. 313-314. Available at: <https://www.repository.law.indiana.edu/ijgls/vol8/iss2/2>. Accessed 1/11/2021.

<sup>21</sup> Simma Bruno. From Bilateralism to Community Interest. In *International Law, Recueil des Cours*, 1994, page 24. Available at: <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199588817.001.0001/acprof-9780199588817>. Accessed 30/10/2021.

<sup>22</sup> Finnemore, Martha and Sikkink, Kathryn. International Norms Dynamics and Political Change. *International Organization*, 1998, (58)4, pp. 898-902. Available at: <https://www.jstor.org/stable/2601361?seq=1>. Accessed 30/10/2021.

<sup>23</sup> Finnemore Martha and Sikkink Kathryn, ref. 22, page 902.



	<i>Stage 1 Norm emergence</i>	<i>Stage 2 Norm cascade</i>	<i>Stage 3 Internalization</i>
<i>Actors</i>	Norm entrepreneurs with organizational platforms	States, international organizations, networks	Law, professions, bureaucracy
<i>Motives</i>	Altruism, empathy, ideational, commitment	Legitimacy, reputation, esteem	Conformity
<i>Dominant mechanisms</i>	Persuasion	Socialization, institutionalization, demonstration	Habit, institutionalization

*Table 1: Stages of Norms*<sup>24</sup>

It is believed that the process of internalization increases awareness and recognition not only of legal obligations and international legal principles, but also of the costs of breaking these binding norms.<sup>25</sup> At the same time, if norm internationalization is inadequate, the probability that governments will feel bound to obeying the rules is lowered.<sup>26</sup> A state which initially does not intend to comply with the law may be prompted to do otherwise if the consequences of non-compliance are discouraging and pressures exerted by the international community are insistent in terms of creating, internalizing, and managing the norms.<sup>27</sup>

To protect its interests, the international community as an entity bears responsibility for ensuring that international norms are respected. But since the international community usually lacks a fully satisfactory enforcement mechanism, it is left to states to take appropriate measures.<sup>28</sup>

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The internalization of norms means that they acquire taken-for-granted quality as individuals understand what their value is and why they are important.

<sup>24</sup> *Ibid.*, 898.

<sup>25</sup> Zartner Dana. *Courts, codes, and custom: Legal tradition and state policy toward international human rights and environmental law*. New York: Oxford University Press, 2014, page 41. ISBN: 9780199362103.

<sup>26</sup> Cohen Amichai. Bureaucratic internalization: Domestic governmental agencies and the legitimization of international law. *Georgetown Journal of International Law*, 2005, 36(4), page 1081. Available at: <https://ssrn.com/abstract=836045>. Accessed 1/11/2021.

<sup>27</sup> Guzman Andrew, ref. 6, page 9.

<sup>28</sup> *Ibid.*, 15-17.

## C. Third Level: Structural Level

According to international law and international relations theorists, the third level at which violation of international law can occur is the so-called “structural level.” This refers primarily to the incapacity of the international system to maintain and enforce international law.<sup>29</sup>

It has been argued that law is “neither spontaneously accepted nor automatically obeyed.”<sup>30</sup> Since laws and agreements limit the freedom of nations, it is assumed that governments will not abide by them unless it is in their interest or they are compelled to do so by outside authority and power.<sup>31</sup> In international law, few concrete reinforcement and punishment mechanisms are present in the level of the international system. Therefore, international law is often considered somewhat toothless – “covenants, without the sword, are but words and of no strength.”<sup>32</sup>

Whereas a judicial body can rule over any dispute in the domestic sphere, the principle of compulsory jurisdiction is in most cases absent from the international level.<sup>33</sup> In the event of a breach of obligation, recourse to courts and tribunals is exceptional, and often the injured state must primarily rely on its own forces. Although international treaties may engender penalties for non-compliance and international courts and tribunals have been set up, their enforcement abilities are much weaker than those of domestic systems, due to the lack of centralized enforcement. In domestic disputes, contrary to international law, institutions such as courts and police are designated to ensure enforcement of and compliance with binding decisions.<sup>34</sup>

Moreover, international judicial bodies face certain limitations, as has been the case with the International Court of Justice (“ICJ”), the principal judicial organ of the UN, whose proceedings are based solely on states’ consent.<sup>35</sup> Even if states consent to having the ICJ rule over their cases, it cannot be ensured that states which have failed to respect the ICJ’s jurisdiction will be compelled to do so. When a state refuses to comply in this sense, the judgments of the ICJ can

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<sup>29</sup> Cogan, Jacob K, ref. 2, page 195.

<sup>30</sup> Zoller, Elisabeth, *Peacetime unilateral remedies: an analysis of countermeasures*. Boston: Brill Academic Publisher, 1984, introduction (xi). ISBN: 978-0941320214.

<sup>31</sup> Henkin, Louis, ref. 1, page 49.

<sup>32</sup> Hobbes, Thomas. *Leviathan*. Oxford: Clarendon Press, 2014, page 85. ISBN: 978-0-19-870908-4.

<sup>33</sup> With the exception of judicial decision in the framework of certain organizations or in particular fields

<sup>34</sup> Zartner, Dana. *Internalization of International Law*, 2000. pp. 6-7. International Studies Department, University of San Francisco. Available at: <https://doi.org/10.1093/acrefore/9780190846626.013.225>. Accessed 4/11/2021. Warioba Sinde, J. *Monitoring Compliance with and Enforcement of Binding Decisions of International Courts*. *Max Planck Yearbook of United Nations Law*, 2001, 5(1), page 42. Available at: doi: <https://doi.org/10.1163/187574101X00033>. Accessed 5/11/2021.

<sup>35</sup> International Court of Justice. *Basis of the Court's Jurisdiction*. Available at: <https://www.icj-cij.org/en/basis-of-jurisdiction>. Accessed 5/11/2021.

be enforced by the UN Security Council (which has a monopoly on the enforcement of judgments of the international court). According to Article 94(2) of the UN Charter, “If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.” Nevertheless, it is often highlighted that this provision has only been used in exceptional instances.<sup>36</sup>

According to international relations and law theorists, the problem of enforcement of judicial decisions within the institutional system is a phenomenon which threatens the integrity, authority, and viability of an international judicial body.<sup>37</sup> In connection with this perception, scholars argue that it is not possible to generate collective benefits of cooperation unless a central enforcement mechanism is available, for example in the form of a punishment, which would deter states from avoiding their obligations. It has been posited that “a punishment strategy is sufficient to enforce a treaty when each side knows that if it cheats it will suffer enough from the punishment.”<sup>38</sup>

Economic sanctions figure among the main means to enforce international law. The use of sanctions is supposed to raise the cost of non-compliance, thus making it less attractive.<sup>39</sup> In other words, sanctions can serve as a deterrent. The same principle underlies, for instance, “out-casting,” i.e., denying non-compliant states the benefits of social cooperation and membership or the use of markets. In contrast to the negative form of coercion and enforcement, a positive form of it can consist of monetary, political, or social rewards, such as increased aid.<sup>40</sup>

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<sup>36</sup> Pellet, Alain. *Judicial Settlement of International Disputes*. *Oxford Public International Law*, 2013, paragraph 47. Available at: <https://prawo.uni.wroc.pl/sites/default/files/students-resources/law-9780199231690-e54-1.pdf>. Accessed 5/11/2021.

This possibility was used for instance in the Anglo-Iranian Oil Company Case of 1951, the Nicaragua case of 1986 or the Bosnia case of 1993.

<sup>37</sup> Amr, Sahmed, M. *The Role of the International Court of Justice as the Principal Organ of the United Nations*, The Hague: Kluwer Law International, 2003, page 439. ISBN 90-411-2026-2.

<sup>38</sup> Downs George, W. and Rocke David M., and Barsoom Peter N. Is the Good News about Compliance Good News about Cooperation. *International Organization* 1996, 50(3), page 385. Available at: [https://www.jstor.org/stable/2704030?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/2704030?seq=1#metadata_info_tab_contents). Accessed 6/11/2021.

<sup>39</sup> Downs George, W. and Rocke David M., and Barsoom Peter N., ref 38, pp. 385–386.

<sup>40</sup> Van Aaken Anne and Simsek Betül, ref. 16, page 197-218.

### III. International Humanitarian Law

This thesis addresses the violation of international norms which fall under international humanitarian law (“IHL”). To better understand the nature, purpose, and sources of these rules, this chapter introduces the concept of international humanitarian law.

Also known as the “Law of Armed Conflict” or the “Law of War,” IHL is considered to be one of the oldest branches of international law. According to Jean Pictet, the expression “humanitarian law” combines two different ideas, namely legal and moral. Whereas the former relates to rules, their recognition and regulatory character, the latter refers to the “sentiment of active goodwill towards mankind”.<sup>41</sup>

IHL applies once an armed conflict has begun. Its mission is to limit the effects of armed conflicts, regulate the means and methods of warfare, and protect individuals who do not take part in the fighting, including civilians, medical personnel, and prisoners of war and other detainees.<sup>42</sup> This is also described as the *ius in bello* concept, or “law governing the conduct of hostilities.”<sup>43</sup> As opposed to provisions under the *ad bello concept*, the question of lawfulness or unlawfulness of armed conflicts is beyond the scope of IHL, which regulates the means and methods of warfare under the following principles: that of humanity; that of distinction between civilians and combatants, and between civilian objects and military objectives; that of proportionality; and that of military necessity.<sup>44</sup>

IHL rules come from several distinct sources. Article 38 of the Statute of the International Court of Justice lists international treaties, international custom, and general principles of law as the

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<sup>41</sup> Pictet, Jean. The Principles of International Humanitarian Law. *International Review of the Red Cross*, 1996, 6(66), page 455. Available at: <https://doi.org/10.1017/S0020860400011451>. Accessed 12/11/2021.

<sup>42</sup> ICRC. What is International Humanitarian Law? *Advisory Service on International Humanitarian Law*, 2004. Available at: [https://www.icrc.org/en/doc/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf). Accessed 12/11/2021.

Saul, Ben and Akande, Dapo. *The Oxford Guide to International Humanitarian Law*. Oxford: Oxford University Press, 2020, Introduction. ISBN: 978-0-19-885530-9.

Pictet, Jean, ref. 41, page 461.

<sup>43</sup> Carsten, Stahn, ‘Jus ad bellum’, ‘jus in bello’ . . . ‘jus post bellum’? –Rethinking the Conception of the Law of Armed Force, *European Journal of International Law*, 2006 (17)5.

Available at: <https://doi.org/10.1093/ejil/chl037>. Accessed 13/11/2021.

<sup>44</sup> ICRC. Fundamental Principles of IHL. Available at: <https://casebook.icrc.org/glossary/fundamental-principles-ihl>. Accessed 13/11/2021.

main sources of IHL. As subsidiary sources, the statute lists “the judicial decisions and the teachings of the most highly qualified publicists.”<sup>45</sup>

In terms of the first IHL source mentioned, i.e. treaties, IHL is deemed one of the most codified branches of international law. Many factors could explain IHL’s considerable degree of codification. One of the reasons for this is that the detailed rules of IHL, which contain specific prescriptions of a procedural or substantive nature, can only reasonably be set out in written form, and treaties are their most natural form of expression. Another is that IHL must be applied mainly by soldiers, higher military officers, or ordinary citizens, who have no legal training. Therefore, it is important that the law is available in a form which tells them clearly and in detail what is expected of them. Such detailed regulation requires the adoption of treaty law.<sup>46</sup>

A significant number of treaties govern the conduct of hostilities and the protection of the civilian population. These include the Hague Convention (1907); the four Geneva Conventions (1949) and their three Additional Protocols (1977, 1997, 2005); and weapons limitation treaties such as the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.

The second source of IHL rules and principles, customary law, is defined as “evidence of a general practice accepted as law.”<sup>47</sup> Two elements form a custom: that of practice and that of *opinio juris*.<sup>48</sup> By nature, customary law is not itself written, but rather identified through judicial decisions or legal writings.<sup>49</sup> It exists alongside treaty law but independently from it; there is no hierarchical relationship between them. Historically, customary law has often preceded treaty law and served as the foundation for many concepts underlying IHL treaties. This should

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<sup>45</sup> International Court of Justice. Statute of the International Court of Justice, Art. 38. Available at: <https://www.icj-cij.org/en/statute>. Accessed 13/11/2021.

<sup>46</sup> Kolb Robert and Del Mar Katherine. Treaties for Armed Conflict. The Oxford Handbook of International Law in Armed Conflict, 2014, pp. 1-2. Available at: <https://www.oxfordhandbooks.com/view/10.1093/law/9780199559695.001.0001/law9780199559695-e-4>. Accessed 15/11/2021.

<sup>47</sup> International Court of Justice, ref. 45, Art. 38(1)(b).

<sup>48</sup> *Opinio juris* can be defined as a) the belief that a given practice is a norm of international law; the State "recognizes" the legal right to act in accordance with that practice as a fact.

*Opinio Juris* defined as b) acceptance - *opinio juris* means acquiescence; the state recognizes a "practice" as law, which means it approves that all states have the legal right to act in accordance with that practice. For more information: Dahlman, Christian. The Function of *Opinio Juris* in Customary International Law. *Nordic Journal of International Law* 2012 (81), pp. 330-331. Available at: [https://brill.com/view/journals/nord/81/3/article-p327\\_3.xml](https://brill.com/view/journals/nord/81/3/article-p327_3.xml). Accessed 15/11/2021.

<sup>49</sup> Saul, Ben and Akande, Dapo, ref. 42, page 17.

not be considered a rule, however, as customary law may also develop after the conclusion of a treaty, or a treaty may prevent the development of new customary law.<sup>50</sup>

Other sources of IHL comprise the so-called “general principles of law.” They are described in the Statute of the International Court of Justice as legal principles recognized in all developed national legal systems.

Finally, the Statute of the International Court of Justice lists as the next sources of IHL “the judicial decisions and the teachings of the most highly qualified publicists.” According to Article 38 of the Statute, they are “secondary sources”. Their importance lies in identifying and clarifying the rules of the IHL.<sup>51</sup>

Despite its many clear rules, IHL is not always respected. Since IHL applies during wars, and therefore in times of extreme violence, its implementation is bound to remain difficult.

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<sup>50</sup> Saul, Ben and Akande, Dapo, ref. 42, pp. 20-21.

Richard B., Schachter and Charley, Jonathan, I. and Mendelson, Maurice. Disentangling Treaty and Customary International Law. *Proceedings of the Annual Meeting (American Society of International Law)*, 1987 (81), page 157. Available at: <https://www.jstor.org/stable/pdf/25658360.pdf>. Accessed 16/11/2021.

<sup>51</sup> Saul, Ben and Akande, Dapo, ref. 42, page 22.

## IV. The Geneva Conventions of 1949

As suggested in the previous chapter (see III.), the Geneva Conventions, whose name refers to the city where they were signed, are a significant treaty source regulating the conduct of war. Their aim is to protect those not partaking in hostilities in an armed conflict, and their content has changed over time in an effort to provide sufficient protection to war victims.

On 12 August 1949, representatives from 63 governments attended the Geneva Diplomatic Conference, organized to review international humanitarian law and improve standards of human conduct during armed conflicts. The conference resulted in the adoption of the four Geneva Conventions, which remain in force today. Credit was due to the Swiss Federal Council for convening the conference, and to the ICRC as the international humanitarian organization that prepared the four draft conventions.<sup>52</sup>

The four Geneva Conventions approved in the Geneva Diplomatic Conference set international legal standards for humanitarian treatment in war, each focusing on a different area:

- I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (“I. Geneva Convention”);
- II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (“II. Geneva Convention”);
- III. Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (“III. Geneva Convention”);

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<sup>52</sup> Bugnion, Francois. The Geneva Conventions of 12 August 1949: From the 1949 Diplomatic Conference to the Dawn of the New Millennium. *International Affairs (Royal Institute of International Affairs)*, 2000, (76)1, pp. 42-43. Available at: <https://www.jstor.org/stable/2626195>. Accessed 17/11/2021.

The ICRC represents a sui generis entity. Under Swiss law, it has the status of private association, which makes it equivalent to an NGO. However, its treaty-based functions, the role of ICRC in the Movement and the international conferences and the funding by governments resemble the workings of an international organisation. Finally, its close ties to Switzerland, the fact that most of the of Committee members and senior staff are Swiss nationals, and frequent contacts with the Swiss Foreign Ministry are what makes ICRC unique among international organizations and NGOs.

The ICRC describes itself as ‘an impartial, neutral and independent organization’, with an ‘exclusively humanitarian mission’ to protect and assist victims of armed conflict and other violent situations.

The ICRC. *Its Missions and Work*. Geneva: ICRC, 2009, page 4.

#### IV. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (“IV. Geneva Convention”).

The Geneva Conventions of 1949 have been preceded by the Geneva Conventions of 1864, 1906, and 1929.<sup>53</sup> The first three 1949 Conventions were thorough revisions of the earlier ones. They were motivated by the inadequacies of the previous treaties in light of intervening experiences, especially from World War II.

The IV. Geneva Convention, related to the protection of civilians, represented a completely new treaty.<sup>54</sup> However, its adoption was not the only breakthrough in the Geneva Conventions of 1949. Other important changes included the protection of victims of non-international armed conflicts, addressed for the first time ever, in Article 3. Also introduced was a control and enforcement mechanism, the so-called “system of serious violations.”<sup>55</sup>

After the adoption of the Geneva Conventions, the number of non-international armed conflicts and wars of national liberation happened to increase. The only part of the four Geneva Conventions which specifically applied to such situations was their common Article 3, and it could only provide a very basic level of protection to the victims at hand. Moreover, since the law governing the conduct of hostilities had not been updated since 1907, these rules of warfare were also unable to guarantee sufficient protection to victims, especially considering the profound advances in weaponry.<sup>56</sup> In response, two protocols were added to the four Geneva Conventions of 1949 and adopted in 1977: the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (“Protocol I”); and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”).

Protocol II was the first-ever international treaty dedicated entirely to non-international armed conflicts. A further desire to supplement the Geneva Conventions of 1949 and their two subsequent protocols—to enhance the protective value and universal character of these treaties—

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<sup>53</sup> Crowe, Jonathan. The Geneva Conventions and their Additional Protocols. In: Massingham, Eve and McConachie, Annabel. *Ensuring Respect for International Humanitarian Law*. London: Routledge, 2020, page 13.

<sup>54</sup> Yingling, Raymund T. and Ginnan, Robert W. The Geneva Conventions of 1949. *The American Journal of International Law*, 1952 (46)3, page 394. Available at: <https://www.jstor.org/stable/pdf/2194498.pdf?refreqid=excelsior%3A63adb164cfb1a76eab5e81ba6afdfc15>. Accessed 18/11/2021.

<sup>55</sup> Bugnion, Francois, ref. 53, page 42. The Geneva Conventions of 12 August 1949: From the 1949 Diplomatic Conference to the Dawn of the New Millennium. *International Affairs (Royal Institute of International Affairs)*, 2000, (76)1, page 42.

<sup>56</sup> *Ibid.*, 45.



resulted in the 2005 enactment of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (“Protocol III”). Protocol III introduced an emblem commonly referred to as “Red Crystal,” which medical and religious personnel may display in times of war instead of the traditional Red Cross or Red Crescent symbols. Although the Red Cross and Red Crescent are meant to be symbols of neutrality, they were perceived in some countries as having religious, political, or cultural connotations. The additional emblem was therefore put forward. Military medical services and relief workers displaying any of these protective emblems (the Red Cross, Red Crescent, or Red Crystal) must be protected by all parties to a conflict.<sup>57</sup>

## A. Application of the Geneva Conventions

The situations in which the Geneva Conventions apply are specified in Article 2 and Article 3, which are common to all four Conventions.

According to Article 2, “the Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>58</sup> This formulation of the rules in Article 2 extends the scope of application of the Geneva Conventions, since these provisions enter into force even when hostilities between states do not result from a formal declaration of war.

Moreover, Article 2 of the Geneva Conventions addresses situations in which not all states which are parties to a conflict are parties to the agreement, determining that although “powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power if the latter accepts and applies the provisions thereof.”<sup>59</sup>

Since 1945, international wars have become rare and civil wars more common.<sup>60</sup> In an effort to address the phenomenon of a growing number of conflicts of a non-international nature and the

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<sup>57</sup> Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005. ICRC. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/615?OpenDocument>. Accessed 15/4/2022.

<sup>58</sup> ICRC. The Geneva Conventions of 1949. Art. 2.

Available at: <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf>. Accessed 23/11/2021.

High Contracting Parties – a State which has consented to be bound by the treaty and for which the treaty is in force.

<sup>59</sup> ICRC, The Geneva Conventions of 1949, ref. 58.

<sup>60</sup> Dupuy, Kendra and Rustad, Siri Aas, Peace Research Institute Oslo. Trends in Armed Conflict (1946–2017), 2018, Available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/Dupuy%2C%20Rustad->

excesses associated with them, Article 3 of the Geneva Conventions was introduced. Due to its character, it also became known as “convention in miniature.”<sup>61</sup>

According to the Geneva Conventions, the provisions in Article 3 shall be applied “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>62</sup> Article 3 declares that “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat ... shall in all circumstances be treated humanely.”<sup>63</sup> Furthermore, it prohibits violence to life and person, the taking of hostages, outrages upon personal dignity, the passing of sentences, and the carrying out of executions without previous judgment pronounced by a regularly constituted court. It imposes an obligation on the parties to the conflict to collect and treat the wounded and sick, enables an impartial body to offer its services, and recommends parties to the conflict to bring into force “all or part of the other provisions of the present Convention.”<sup>64</sup>

However, even in cases of genuine effort in complying with Article 3, the position of non-combatants remains inferior to that of their counterparts in an international conflict, since for those who have become *hors de combat* by sickness, wounds, or capture, Article 3 does not offer victims protection against being killed on grounds of “treason.”<sup>65</sup>

## **B. The Scope of the Application of the Geneva Conventions of 1949 in the Vietnam War**

Except for the NLF, all the other parties to the Vietnam War (North Vietnam, South Vietnam, and the US) were signatories of the Geneva Conventions.<sup>66</sup> The application of the agreement was complicated by the character of the conflict, whose parties did not include solely states.

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%20Trends%20in%20Armed%20Conflict%2C%201946%E2%80%932017%2C%20Conflict%20Trends%205-2018.pdf Accessed 19/11/2021.

<sup>61</sup> Elder, David A. The Historical Background of Common Article 3 of the Geneva Conventions, 1979 (11)1, page 38, Available at: <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1940&context=jil>. Accessed 25/11/2021.

<sup>62</sup> ICRC, The Geneva Convention of 1949, ref. 5, Article 3.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Farer, Tom. “Humanitarian Law and Armed Conflicts: Toward the Definition of ‘International Armed Conflict.’” *Columbia Law Review*, 1971, 71(1), page 39. Available at: [https://www.jstor.org/stable/1121272?refreqid=excelsior%3Abee2eadbb5742c2d23bc18229c7f23d0&ab\\_segments=&origin=](https://www.jstor.org/stable/1121272?refreqid=excelsior%3Abee2eadbb5742c2d23bc18229c7f23d0&ab_segments=&origin=). Accessed 26/11/2021.

<sup>66</sup> After the division of Vietnam by the 1954 Geneva Indochina Conference and the formation of separate and mutually independent governmental powers with their own armed forces in North Vietnam and South Vietnam, both parts of Vietnam have acquired a high degree of independence under international law. Therefore, at least for the question of an armed conflict between the two subdivisions or one subdivision in relation to another state,

As suggested earlier, in applying the Geneva Conventions, a distinction is made between armed conflict of an international character and armed conflict of a non-international character. However, the Vietnam War has widely been considered as falling into both of these types of conflict. Its “non-international character” refers to fighting within South Vietnam involving the ruling parties and their supporting forces, with the US and other countries on one side and the Viet Cong on the other. Its “international character” describes armed conflict between independent North Vietnam and South Vietnam and their respective supporting forces.<sup>67</sup>

As such, these conflicts are legally independent from each other. In the case of armed conflicts of an international character, the rules of the international law of war, and thus also the provisions of the four Geneva Conventions, should apply. As for armed conflicts of a “non-international character occurring in the territory of one of the High Contracting Parties,” the minimum standards of international law (i.e., Article 3 of the four Geneva Conventions) should apply.<sup>68</sup>

However, the NLF did not consider itself to be bound by the Geneva Conventions; interestingly, the delegates to the 1949 Conference had omitted the question of whether any convention could bind insurgent parties which were not signatories.<sup>69</sup> It should also be noted that the Conventions do not constitute any organization which would provide a binding interpretation of ambiguous terms, and as mentioned in the previous subchapter (see IV. A.), Article 3 does not attempt to characterize the phenomenon of a non-international conflict. The application of Article 3 by the parties to a conflict is therefore voluntary.<sup>70</sup>

In addition to the NLF, North Vietnam raised objections to the application of the Conventions, particularly to that of the Third Geneva Convention, related to prisoners of war. North Vietnam invoked the reservation it made in 1957 with respect to Article 85. According to Article 85, if

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North Vietnam and South Vietnam can act as warring parties and thus possess subjectivity under the international law of war.

The US ratified the Conventions in 1955.

The Republic of Vietnam (South) and the Democratic Republic of Vietnam (North) were both accessions to the Conventions in the years 1953 and 1957.

<sup>67</sup> B AG 202 223-013 – Application ou violation des Conventions de Genève, généralités, deuxième partie 1/8/1966-29/12/1966. Moritz, Günther - Völkerrechtliche Frage des Vietnamskonflikts.

<sup>68</sup> Ibid.

The Geneva Conventions 1949, ref. 58, Article 3.

<sup>69</sup> The Harvard Law Review Association. The Geneva Convention and the Treatment of Prisoners of War in Vietnam. *Harvard Law Review*, 1967, 80(4), page 856. Available at: <https://www.jstor.org/stable/1339384>. Accessed 28/11/2021.

<sup>70</sup> ICRC. Commentary of 2020 Article 3: Conflicts not of an international character. Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=31FCB9705FF00261C1258585002FB096>. Accessed 28/11/2021.

prisoners of war are prosecuted for acts committed prior to capture, they shall retain the benefits of the Convention, even upon conviction.<sup>71</sup> Amid the process of ratifying the III. Geneva Convention in 1957, North Vietnam's reservation to Article 85 was as follows: "The prisoners of war prosecuted for *and* convicted of war crimes or crimes against humanity consistent with the principles laid down by the Nuremberg Court of Justice shall not be given the benefit of the provisions of this Convention as specified in Article 85."<sup>72</sup>

North Vietnam argued then that American pilots were "pirates" and "war criminals" and that the provisions of the III. Geneva Convention should therefore not apply to them. If read in the conjunctive sense, as many lawyers consider to be correct, both prosecution *and* conviction would be required before a prisoner of war could be denied the protection of Article 85. However, it should be noted that the American pilots had neither been prosecuted nor convicted.<sup>73</sup>

Furthermore, North Vietnam claimed that American prisoners were not entitled to prisoner-of-war status, due to the absence of a legal state of war between the US and North Vietnam. Meanwhile, according to the Geneva Conventions, it "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."<sup>74</sup> This minimizes possibilities for states to evade their obligations under humanitarian law by simply not declaring war or refusing to acknowledge the existence of an armed conflict. It also moves away from conditioning the applicability of the Geneva Conventions solely on the legal concept of war.

It is argued that the principle of IHL is equally applicable to the lawful and unlawful parties to an armed conflict, as is to be found in the Article 1 common to the Geneva Conventions, which states that "the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."<sup>75</sup> Nevertheless, also in this case, there is no central authority under international law to identify or classify a situation as an armed conflict.

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<sup>71</sup> ICRC. Geneva Conventions 1949. ref. 58, Art. 85.

<sup>72</sup> The Harvard Law Review Association, ref. 71, page 862.

Schmitt, Michael N., and Green, Leslie C. Maltreatment of Prisoners of War in Vietnam. *Boston University Law Review*, 1968, page 174. Available at: <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1495&context=ils>. Accessed 28/11/2021.

A similar reservation to Article 85 was made by several Soviet-block countries.

<sup>73</sup> The Harvard Law Review Association, ref. 71, page 862.

Schmitt, Michael N. and Green, Leslie C., ref. 76, page 174.

ICRC. International Review of the Red Cross, 1976 (181), page 175 Available at: [https://tile.loc.gov/storage-services/service/ll/llmp/65002328\\_RC\\_Apr-1976/65002328\\_RC\\_Apr-1976.pdf](https://tile.loc.gov/storage-services/service/ll/llmp/65002328_RC_Apr-1976/65002328_RC_Apr-1976.pdf). Accessed 1/12/2021.

<sup>74</sup> ICRC. Geneva Conventions 1949. ref. 58, Art. 2.

<sup>75</sup> *Ibid.*, Art. 1.

## V. Non-Compliance of the Parties with the Geneva Conventions in the Vietnam War

In June 1965, the ICRC, in keeping with its humanitarian tradition and concerned about the increasing internationalization of the conflict and the continuous prolongation of hostilities, issued an appeal to all parties to the Vietnam War. In its letter, the ICRC stated that the regulations of humanitarian law should apply to the hostilities in Vietnam because “they have assumed such proportions that there can no doubt they constitute an armed conflict to which the regulations of the humanitarian law as a whole should be applied.”<sup>76</sup> Whereas South Vietnam and the US replied that they were prepared to respect the provisions of the Geneva Conventions, North Vietnam and the NLF raised objections.

Over time, it became clear that all parties to the conflict violated the Geneva Conventions, whether or not they had committed to adhering to them. Information about torture, systematic bombing of civilian targets, torture of prisoners of war, and suspect were not unusual.<sup>77</sup> Cases of deliberate destruction of hospitals and medical supplies were also observed.<sup>78</sup> Many of these acts are strictly condemned by the Geneva Conventions.<sup>79</sup>

The III. Geneva Convention prohibits the torture of prisoners of war, and the high contracting parties have committed to ensuring that prisoners of war “must at all times be humanely

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<sup>76</sup> ICRC. Respect for the Rules of Humanity in Vietnam. *International Review of the Red Cross*, 1965(53), pp. 417-418. Available at: <https://international-review.icrc.org/sites/default/files/S0020860400015394a.pdf>. Accessed 2/12/2021.

<sup>77</sup> B AG 202 223-012 - Application ou violation des Conventions des Genève, généralités, première partie, 1/10/1965-29/7/1966. ICRC. „Did you do this? Even if you didn't you are involved.”

<sup>78</sup> B AG 202 223-035 - Correspondence échangée avec Monsieur K. E. Wallach de Fairborn (Ohio, USA) concernant la destruction d'un hôpital et du stock de médicaments et sur l'autorisation de visiter le camps de prisonniers de guerre par la Puissance détentrice, 15/6/1966-20/4/1970. ICRC. Possible violation of Convention protecting prisoners from curiosity and insult.

B AG 202 223-035 - Correspondence échangée avec Monsieur K. E. Wallach de Fairborn (Ohio, USA) concernant la destruction d'un hôpital et du stock de médicaments et sur l'autorisation de visiter le camps de prisonniers de guerre par la Puissance détentrice, 15/6/1966-20/4/1970. ICRC. Buddhist Seize Part of Saigon, Police Smash Barriers, Use Clubs, Gas on Mob.

The mistreatment and torture of the POW is well documented – a) Rochester, Stuart I and Kiley, Frederick.: *Honour Bound: American Prisoners of War in Southeast Asia 1961-1973*. Annapolis: Naval Institute Press, 2013, page 736 b) Berni, Marcel: *Ausser Gefecht: Leben, Leiden und Sterben „kommunistischer“ Gefangener in Vietnams amerikanischen Krieg*. Hamburg: Hamburger Edition, 2020, page 528.

<sup>79</sup> Bombing of civilian targets and use of poisonous gas is prohibited in 51(2) of the Additional Protocol I - The civilian population as such, as well as individual civilians, shall not be the object of attack.

treated.”<sup>80</sup> Similarly, in the IV. Geneva Convention hospitals are entitled to the protection and “may in no circumstances be the object of attack.”<sup>81</sup> Most of the time, the hostilities undertaken by both sides of the Vietnam War were accompanied by a propaganda battle. In practically every armed conflict, the parties accused one another of numerous violations of the Geneva Conventions.<sup>82</sup>

The following subchapters will focus on the possible reasons for non-compliance with the Geneva Conventions by the parties to the conflict. Since the fact that all parties were non-compliant is widely evidenced, it will not be addressed further in this thesis.

The reasons for non-compliance will be gauged from the three perspectives of the state, communal, and structural levels. The Vietnam War proved to be a significant conflict of the 20th century through which to test compliance with the Geneva Conventions.

## **A. First Level: State Level**

The first level which could explain non-compliance with international norms is associated with the parties to the conflict (see II. A.). This level is closely linked to their will and capability, or lack thereof, to abide by specific norms.

The question to be examined is what evidence from the Vietnam War might show that the parties failed to comply with norms due to their lack of capability or lack of will to do so. As discussed earlier, parties to a conflict which are unwilling to apply norms of international law may be tempted to justify their position by invoking the abstract nature of the provisions concerned or by interpreting the treaty in their favor. Theories on state non-compliance with international norms have pointed to its often being rooted in the ambiguity of treaty language – whether it is general language that can lead to multiple interpretations, treaty drafters’ failure to anticipate many possible applications, or the treaty’s inadaptability to current issues.<sup>83</sup> Also, states’ interpretation is often influenced by short-term national interests and power politics.<sup>84</sup> In such situations, state behavior is often based on cost-benefit calculations. Violators in such

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<sup>80</sup> ICRC. Geneva Conventions 1949, ref. 58, Art. 13. Geneva Convention Relative to the Treatment of the Prisoners of War.

<sup>81</sup> Ibid., Article 18, Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

<sup>82</sup> B AG 202 223-036 - Protestations concernant les mauvais traitements infligés aux prisonniers et aux civils, première partie, 5/1/1966 – 28/5/1968. ICRC. Correspondence J. P. Maunoir Delegate and Mr. John Thompson.

<sup>83</sup> Chayes, Abraham and Chayes, Antonia H, ref. 7, pp. 188-192.

<sup>84</sup> Johnstone, Ian. Treaty Interpretation: The Authority of Interpretive Communities 1991, 12(2), page 372. Available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1647&context=mjil>. Accessed 20/12/2021.

cases may, for example, take advantage of the ambiguities of the treaty's text, knowing that such ambiguity would reduce the responses to the violation.

In analyzing various sources, it becomes clear, as discussed below, that parties to the conflict sought to justify the inapplicability of the Geneva Conventions based on the treaty's vague or abstract formulations and inability to adapt to current issues. The NLF expressed on several occasions that it did not consider itself to be bound by the treaty, since it had not signed or ratified it. For example, it argued that "these conventions contain articles that do not correspond at all to our action and to the organization of the NLF armed forces."<sup>85</sup>

Similarly, North Vietnam raised objections against the application of the III. Geneva Conventions, invoking a reservation it made in 1957 with respect to Article 85, and stating that it was a victim of unilateral aggression since the US had committed crimes against humanity and there was no legal state of war between the US and North Vietnam.<sup>86</sup> According to the aforementioned North Vietnamese reservation to Article 85, "the prisoners of war prosecuted for *and* convicted of war crimes or crimes against humanity... shall not be given the benefit of the provisions of this Convention as specified in Article 85."<sup>87</sup> As discussed in the previous sub-chapter (see IV. B.), this reservation would appear not to divest a person of prisoner of war status until the moment of conviction ("prosecuted for *and* convicted"). However, North Vietnamese applied a different interpretation, insisting that the language in the treaty justified denying the person's rights from the beginning of the prosecution. This interpretation, questionable to say the least, made it possible not to apply the status of war to the cases of many prisoners who had not been convicted. Although the problem of states' interpretation of international norms is usually discussed in relation to the articles of the treaties themselves, in this case it also appears to be one of interpretation of reservations.

One must admit that the Geneva Conventions were not sufficiently precise or fully adaptable to the Vietnam War. For example, the Conventions do not specify what is to be understood as a "non-international conflict," or describe the role of insurgency parties in detail. The same applies to the question of how to identify or classify armed conflicts. The high contracting parties

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<sup>85</sup> B AG 200 223-017, ref. 71.

B AG 202 223-004 - Communiqué n° 808 du 26 juillet 1965, appel pour le respect des règles humanitaires au Vietnam, réponses positives du gouvernement américain et du gouvernement sud-vietnamien, 26/7/1965-19/8/1965. ICRC. Note à l'attention de Monsieur J. Pictet.

<sup>86</sup> B AG 200 223-016. Correspondence et notes, première partie, 6/1/1966-10/12/1967. Summary prepared by Alessandro Casella, May 1966.

The Harvard Law Review Association, ref. 73, page 860.

<sup>87</sup> The Harvard Law Review Association, ref. 71, page 862.

have wide latitude in interpreting the meaning of the Conventions; the absence of a central authority to decide on these questions is associated with certain weaknesses, allowing states to choose the interpretation they consider best for themselves in a given situation.

In addition to the interpretation of unclear treaty language, the interests of the parties to a conflict are considered a reason why they may not comply with international norms. States can have common as well as conflictual interests, such as the desire to maximize economic welfare or to ensure security. The Vietnam War itself was largely a battleground for opposing ideologies: communism versus democracy.<sup>88</sup>

The conflict was undoubtedly of great significance to both sides. The objective of North Vietnam and the NLF was to expand revolutionary sources in South Vietnam, overthrow the “puppet American administration” in South Vietnam, and unify North and South Vietnam.<sup>89</sup> US officials viewed the conflict in Vietnam as an integral part of their struggle against communism and an instrument of the Soviet drive for world domination; they feared that if Vietnam fell, the US would lose all of Indochina and the rest of South Asia to communism (the so-called “domino theory”).<sup>90</sup> Given the high stakes for each party, it is easy to imagine that the priority was to win the war by any means necessary, and that humanitarian law was put in the background. These crucial interests undoubtedly took priority over reputation, which sometimes motivates states to respect humanitarian law, as discussed in the theoretical section (see II. A.).

Another reason often mentioned in connection with the violation of the Geneva Conventions, especially by the United States and South Vietnam, is the issue of reciprocity. It is argued that because North Vietnam and the NLF refused to comply with the Geneva Conventions, the US was less motivated to comply, as well. In other words, its compliance was conditional on reciprocal compliance by the enemy. In 1955, Defense Department General Counsel Wilber M. Brucker described the position of the US on reciprocity on these terms: “If our enemy showed by the most flagrant and general disregard for the treaties, that it had in fact thrown off their

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<sup>88</sup> B AG 202 223-012 - Application ou violation des Conventions des Genève, généralités, première partie, 1/10/1965-29/7/1966. ICRC. Handling of Communist POWs by the RVNAF.

<sup>89</sup> Van der Kroef, Justus M. What are the aims of the NLF? Vietnam Perspectives 1967 3(2), page 4. Available at: [https://www.jstor.org/stable/pdf/30182518.pdf?refreqid=excelsior%3Af71cb282dcfe555b114f38c4cdfae2b8&ab\\_segments=&origin=](https://www.jstor.org/stable/pdf/30182518.pdf?refreqid=excelsior%3Af71cb282dcfe555b114f38c4cdfae2b8&ab_segments=&origin=). Accessed 18/12/2021.

<sup>90</sup> Herring, George C. America and Vietnam: The Unending War. Foreign Affairs 1991, 5(70) America and the Pacific, 1941-1991, pp. 105-107. Available at: [https://www.jstor.org/stable/pdf/20045006.pdf?refreqid=excelsior%3Aefb8bcc9f4d7b945039845021704c560&ab\\_segments=&origin=](https://www.jstor.org/stable/pdf/20045006.pdf?refreqid=excelsior%3Aefb8bcc9f4d7b945039845021704c560&ab_segments=&origin=). Accessed 18/11/2021.



restraint altogether, it would then rest with us to reconsider what our position might be.”<sup>91</sup> The US reacted similarly to the ICRC’s appeal that the Geneva Conventions be applied in the Vietnam War, declaring that not only would it apply the treaty’s provisions but also expect “the other parties to the conflict to do likewise.”<sup>92</sup> The US authorities also objected to a lack of reciprocity on various instances later during the Vietnam War.<sup>93</sup> This statement can serve as an example: “We are prepared to pursue any avenue which could lead to a secure and just peace, whether through discussion and negotiation or through reciprocal actions by both sides to reduce the violence.”<sup>94</sup> Similarly, South Vietnam stated that “it is to be hoped that the NLF will show the same humanitarian concern.”<sup>95</sup>

A state’s decision of whether to abide by an international norm may also be influenced by the retaliation that could follow—whether under pressure from domestic courts, another state, the international community, or international courts aiming to obtain compliance with international humanitarian law. However, in the case of the Vietnam War and non-compliance with the Geneva Conventions, pressure from the international community and enforcement mechanisms seemed to be insufficient. This aspect is further discussed in the following two subchapters.

In summary, this chapter so far discussed and evidenced various aspects attempting to explain why parties were unwilling to comply with the Geneva Conventions: reference to the vague wording of the Geneva Conventions, cost-benefit considerations, objections to the lack of reciprocity (raised by the US and South Vietnamese authorities), as well as the weak prospect of retaliation in case of non-compliance, to be elaborated upon further.

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<sup>91</sup> United States Congress. Senate. Committee On Foreign Relations. *Geneva conventions for the protection of war victims report of the Committee on Foreign Relations*. Washington: U.S. G.P.O, 1955, page 60. Available at: <https://www.loc.gov/item/2011525369/>. Accessed 18/12/2021.

<sup>92</sup> ICRC. “Responses to the ICRC’s Appeal to Have the Rules of Humanity Respected in Viet Nam”, page 477. Available at: <https://international-review.icrc.org/sites/default/files/S0020860400011049a.pdf>. Accessed 18/12/2021.

<sup>93</sup> Further evidence can be for instance found in:

B AG 202 223-026 - Proposition de conférence sur les Conventions des Genève et leur application dans le conflit du Viêtnam, 22/7/1966-24/5/1968. ICRC. Correspondence – United States Mission to International Organisations, Geneva and R. Gallopin, September 15, 1966.

Ibid., Correspondence – United States Mission to International Organisations, Geneva and R. Gallopin, August 12, 1966. Meeting at ICRC Headquarters Geneva on August 12, 1966.

B AG 202 223-026. Vietnam – attitude du gouvernement des Etats-Unis à l’égard de ce conflit en général et de la clause de réciprocité, en particulier, August 12, 1966. Proposition de conférence sur les Conventions des Genève et leur application dans le conflit du Viêtnam.

<sup>94</sup> B AG 200 223-016 - Correspondence et notes, première partie, 6/1/1966-10/12/1967. United States Mission, Text of Manila Summit Conference Joint Communique, October 25, 1966.

<sup>95</sup> B AG 202 223-004, ref. 89.

## B. Second Level: Communal Level

The second level at which an environment for non-compliance is created is related to the international community (see II. B.). The international community should ideally operate independently in international relations, transcending the interests of states and eliminating their political power in pursuing what is considered right for all. However, this is not always achieved, and it is necessary to ask why the international community was unable to prevent violations of humanitarian law in the Vietnam War.

Article 1 of the Geneva Conventions states that “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>96</sup> Over the years, this relatively ambiguous formulation (“to ensure respect”) has aroused debate over the right interpretation.<sup>97</sup> Does Article 1 create a legal obligation for states which are parties to the Geneva Conventions, irrespective of their involvement in a particular armed conflict, to take steps to ensure that parties to the conflict act in accordance with the Conventions? According to the subsequent analysis and positions, the prevailing view is that this is the correct explanation for Article 1, since the words “ensure respect” imply an active duty and the term “undertake” suggests a genuine obligation.<sup>98</sup> In essence, this would mean that the provision reaffirms the basic principle of *pacta sunt servanda*, codified in Article 26 of the Vienna Convention on the Law of Treaties, which states that “every treaty in force is binding upon the parties to it and must be performed by them in good faith.”<sup>99</sup> Article 1 would also constitute an *erga-omnes* obligation, that of concern for every state, since it is owed to the international community as a whole.<sup>100</sup>

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<sup>96</sup> The Geneva Conventions of 1949, ref. 58, Art. 1.

<sup>97</sup> Zwanenburg, Marten. The “External Element” of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation, *International Law Studies* 2021, Vol. 97, page 622. Available at: <https://digitalcommons.usnwc.edu/cgi/viewcontent.cgi?article=2966&context=ils>. Accessed 22/12/2021.

<sup>98</sup> ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America)*, Judgment (Merits), 27 June 1986, para. 220. Available at: <https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>. Accessed 28/12/2021.

ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 26 February 2007, para. 162. Available at: <https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>. Accessed 28/12/2021.

<sup>99</sup> United Nations. *Vienna Convention on the Law of Treaties*, 1969, page 26. Available at: [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). Accessed 28/12/2021.

<sup>100</sup> Condorelli, Luigi and Boisson de Chazournes, Laurence. “Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests”, *International Review of the Red Cross* 2000 82(837), 2000, pp. 67–86. Available at: <https://international-review.icrc.org/sites/default/files/S1560775500075404a.pdf>. Accessed 28/12/2021.

In 1970, ICJ for the first identified this category of international obligations with the following words: [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole,

Following this interpretation, the high contracting parties should have ensured that the parties to the conflict acted in accordance with the Geneva Conventions. This responsibility of third states was also highlighted in the Commentaries of the ICRC from the year 1958: “In the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect for the Convention.”<sup>101</sup> The same view was supported during the Vietnam War by the International Lawyers Commission, according to which the parties to the Geneva Conventions—117 states at the time of the conflict—undoubtedly had “a direct duty to use [their] best endeavors to secure the observance of the Geneva Conventions.”<sup>102</sup> Nevertheless, this rule regarding responsibility was never executed in the Vietnam War. The International Lawyers Commission attributes this failure partly to the absence of any procedure for its exercise, since the Geneva Conventions do not specify what form the response of the third parties (states) may take.<sup>103</sup>

In addition to the high contracting parties, it is argued that the ICRC could have influenced the extent to which the Geneva Conventions were respected during the Vietnam War, given the scope of its work in the humanitarian field and its mandate from the international community under two sources: the Geneva Conventions themselves and the ICRC Status. Under the Geneva Conventions, the ICRC has the right to offer impartial and humanitarian services to the parties to the conflict, without any impediments, and its relief work should be “recognized and respected at all times.”<sup>104</sup> Moreover, according to their common Article 8 (I-III. Convention) and 9 (IV. Convention), “the present Conventions shall be applied with the cooperation and under the scrutiny of the Protecting Powers (i.e. a State) whose duty it is to safeguard the interests of the Parties to the conflict”.<sup>105</sup> If no Protecting Power is chosen, the ICRC may act instead of a Protecting Power, as stated in common Article 10 (I.-III. Convention) and 11 (IV. Convention).

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and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former is the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. ICJ, Case Concerning the Barcelona Traction, Light and Power Company, Limited (Barcelona vs. Spain), Judgement of 5 February 1970, ICJ Reports 1970, Para 33. Available at: <https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>. Accessed 29/12/2021.

<sup>101</sup> ICRC. Commentary of 1958. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Available at: <https://ihl-databases.icrc.org/applique/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/0cfe221042c46f8ec12563cd0042a115>. Accessed 2/1/2022.

<sup>102</sup> B AG 202 223-015 - Application ou violation des Conventions de Genève, généralités, quatrième partie, 17/2/1968-29/3/1973. ICRC. International Commission of Jurists, Human Rights in Armed Conflicts, March 7, 1968.

<sup>103</sup> Ibid.

<sup>104</sup> ICRC, The Geneva Conventions of 1949, ref. 58, and Art. 9 (I. and II. Conventions), Art 3 (III. Convention) and Art 142 (IV. Convention).

<sup>105</sup> Ibid., Art. 8 (I.-III. Conventions) and Art. 9 (IV. Convention).

Nevertheless, it is to be noted that the Geneva Conventions, do not constitute a general obligation for the ICRC to oversee the implementation of the Conventions.

The ICRC has been given a special mandate in relation to the Geneva Conventions also under the Statutes of the International Red Cross and Red Crescent Movement, whose Article 4 establishes that the ICRC's role is to "undertake the tasks incumbent on it under the Geneva Conventions, to work for the faithful application of these Conventions and to take cognizance of any complaints regarding alleged breaches of the humanitarian Conventions;" as well as "to work for the continual improvement of humanitarian international law and for the better understanding and diffusion of the Geneva Conventions."<sup>106</sup> This role of the ICRC was also confirmed at the XXth International Red Cross Conference, held in 1965, where the ICRC was urged to enhance its efforts in the application of the Geneva Conventions in all armed conflicts.<sup>107</sup> Given all these provisions and the ICRC's international prestige, many considered the ICRC a key representative of the international community which could encourage parties to a conflict to ensure respect to the Geneva Conventions by virtue of its moral authority.<sup>108</sup>

However, when carrying out its mandate in the Vietnam War, the ICRC encountered many difficulties. One of them was associated with the nature of the conflict and the nature of this humanitarian, neutral organization. When violations of the Conventions occurred, the ICRC attempted to avoid taking a stand on any such act, in an effort to remain neutral and not to be dragged into a propaganda battle between the two sides. However, both sides alleged that the ICRC was in favor of the opponent.<sup>109</sup> An illustrative example is the following letter from the NFL: "We feel that the International Committee of the Red Cross is dependent on American capital. We have taken note of the fact that the Red Cross has not with the word reacted against the American crimes, against torture, etc., in Vietnam. How much the Americans are doing to reinforce their war, the International Committee of the Red Cross does not react. Which could

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<sup>106</sup> The International Red Cross and Red Crescent Movement. Statutes of the International Red Cross and Red Crescent Movement. Adopted at the 25th International Conference of the Red Cross in Geneva in 1986. Art. 5.2 c and 5.2 g. Available at: <https://www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf>. Accessed 5/1/2022.

ICRC. International Review of the Red Cross, 1965, No56, page 618, Art. 4c. Available at:

[https://www.loc.gov/rr/frd/Military\\_Law/pdf/RC\\_Nov-1965.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/RC_Nov-1965.pdf). Accessed 8/1/2022.

<sup>107</sup> Ibid., 575.

<sup>108</sup> B AG 202-223-036 - Protestations concernant les mauvais traitements infligés aux prisonniers et aux civils, première partie, 5/1/1966-28/5/1968. Delegation du Comité International de la Croix Rouge Saigon, Mai, 1968.

<sup>109</sup> B AG 202-223-036 - Protestations concernant les mauvais traitements infligés aux prisonniers et aux civils, deuxième partie, 6/6/1968-20/12/1972. ICRC. Correspondence N. Barde and Mrs. Willing, July 21, 1972.

be the functions of such an organization? What can it do in Vietnam? You must understand that we cannot have a contact with such an organization whatsoever.”<sup>110</sup>

Despite its efforts not to be seen as biased by any of the parties, both sides accused the ICRC of supporting the enemy. On the one hand, when the ICRC paid attention to the attitudes of the NLF and DRV towards the applicability of the Geneva Conventions, it was accused of not criticizing South Vietnam and the US enough for their failure to comply with the Conventions, whose applicability they accepted; on the other, when the ICRC offered humanitarian services to North Vietnam, the US and South Vietnam accused it of insufficient neutrality. Propaganda made it difficult for the ICRC to offer its services and to ensure compliance with the Geneva Conventions. Also, the parties to the conflict were not sufficiently cooperative with the ICRC: For instance, the ICRC was unable to verify whether prisoners of war were being treated humanely, although the Third Geneva Convention requires such inspections of prisoners of war.<sup>111</sup>

The elements discussed above indicate that the ICRC found itself trapped in an uncomfortable situation, in which all parties questioned its impartiality and therefore its credibility. For this reason, the ICRC’s message and actions could not have the desired effect. An additional aspect can be considered: Despite its difficulties taking a clear position in the conflict and criticizing its parties for violating the Geneva Conventions, it is said that the ICRC’s failure mainly consisted of not sufficiently reminding high contracting parties of their obligations in Article 1.<sup>112</sup>

Finally, it should be reiterated that the international community may create norms which are internalized over time, and thus automatically applied during war by actors such as soldiers, generals, politicians, and civilians. Dissemination of the humanitarian standards of the Geneva Conventions is important for ensuring compliance, and the ICRC is considered a crucial actor in this matter. Martha Finnemore and Kathryn Sikkink describe the ICRC as a “moral norm entrepreneur” and “chief socializing agent,” given the organization’s role in the development of norms, disseminating the Conventions, helping states to teach the new rules of war to their soldiers, and collecting information about violations.<sup>113</sup>

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<sup>110</sup> B AG 202-223-013 – Application ou violation des Conventions de Genève, généralités, deuxième partie 1/8/1966-29/12/1966. Danish Interview with Vietcong Representative, 7<sup>th</sup> December 1966.

<sup>111</sup> B AG 202-223-033 – Demande de l'Encyclopedia Britannica adressée à Jacques Freymond, membre du CICR, concernant un article sur les prisonniers de guerre. ICRC. Application of Geneva Prisoners of War Convention to the Conflict in Vietnam, July 1968.

<sup>112</sup> Suther, Keith D. The Work of the ICRC in Vietnam. Article in Instant Research for Peace and Violence, March 1974 4(3) pp. 129-131. Tampere: Peace Research Institute.

<sup>113</sup> Finnemore, Martha and Sikkink, Kathryn, ref. 22, page 902.

According to the Geneva Conventions, it is also the states' task to "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 programs of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population."<sup>114</sup> States' role in the dissemination of the Conventions is often, however, not stressed enough.

For the purposes of this thesis, it is necessary to examine whether there is evidence of internalization of the Geneva Conventions by the parties to the conflict. Such evidence is not always easy to identify, although a study conducted by Ellen Frey-Wouters and Robert S. Laufer in the late 1970s in the US showed that persons directly or indirectly affected by the Vietnam War did not have much understanding of the Geneva Conventions, with only 50% of the veterans and 27% of the non-veterans claiming some familiarity with the rules.<sup>115</sup> Thus, it can be said that there were cases in which the norms were not successfully internalized.

From the context above, it can be concluded that, at the communal level, the environment for non-compliance was mainly created by the high contracting parties' inaction, the ICRC's failure to remind them of their obligations in Article 1 of the Geneva Conventions, as well as by the problematic exercise of the ICRC mandate enshrined in the Geneva Conventions and the Statutes of the International Red Cross and Red Crescent Movement. The actors thus failed at their role as "norm leaders" in the Vietnam War—that of reiterating the rules to the parties, collecting information on violations, and publicizing them to pressure violators into compliance.

### **C. Third Level: Structural Level**

The last level associated with non-compliance refers to the incapacity of the international system to maintain and enforce international law, as well as to control international institutions (see II. C.). This is due to the absence of a strong central authority capable of enforcing the full range of rules which states and non-state bodies are obliged to follow, as a key difference between the international and national legal systems. Hence, for the case of the Vietnam War, it

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<sup>114</sup> Article 144, Convention IV, relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

<sup>115</sup> Wouters-Frey, Ellen. Laufer, Robert S. *Legacy of War. The American Soldiers in Vietnam*. London: Routledge, 2020, page 265. ISBN: 978-0873325622.

should be demonstrated how the enforcement mechanisms of humanitarian law, particularly the Geneva Conventions, were deficient.

As the ICRC and the high contracting parties were involved in drafting the Geneva Conventions, an important part of the discussions was related to the question of enforcement mechanisms. One of the proposals was to improve the “Protecting Powers” system, among other monitoring and enforcement mechanisms. However, major powers disliked this and declined to be legally obliged to accept external oversight on the battlefield.<sup>116</sup> Although many efforts related to law maintenance, enforcement, and monitoring ultimately failed during negotiations, a system for grave breaches was eventually introduced.<sup>117</sup> This was established after almost a century without an effective system of criminal sanctions for the enforcement of international instruments related to armed conflicts.

All four Geneva Conventions define grave breaches (i.e., serious violations of the Conventions) as those involving willful killing, torture, or inhuman treatment, including biological experiments; and willfully causing great suffering or serious harm to body or health.<sup>118</sup> To meet the special aims of the Convention, each of the Geneva Conventions adjusts its definition of grave breaches accordingly, containing further provisions. As part of grave breaches, Article 50 of the I. Geneva Convention, Article 51 of the II. Geneva Convention, and Article 147 of the IV. Also count “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.” Article 130 of the III. Geneva Convention and Article 147 of the IV. Geneva Convention consider a grave breach, *inter alia*, “wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.” Furthermore, Article 130 includes among grave breaches “compelling a prisoner of war to serve in the forces of the hostile Power;” and Article 147 “wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention.”<sup>119</sup>

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<sup>116</sup> Although the protecting power articles were strengthened in the 1949 Geneva Conventions, and extended to be applied to all categories of war victims (in Geneva Conventions of 1929 it was only in relation to POW), the fundamental characteristics of the protection remained unchanged.

<sup>117</sup> Best, Geoffrey. *Law and War since 1945*, pp. 156-157. New Jersey: Clarenton Press, 1997. ISBN: 978-0198206996.

<sup>118</sup> ICRC, *The Geneva Conventions of 1949*, ref. 58, Art. 50 (I. Geneva Convention), Art. 51 (II. Geneva Convention), Art. 130 (III. Geneva Convention), Art. 147 (IV. Geneva Convention).

<sup>119</sup> ICRC, *The Geneva Conventions of 1949*, ref. 58, Art. 50 of the I. Geneva Convention; Art. 52 of the II. Geneva Convention; Art. 130 of the III. Geneva Convention and Art. 147 of the IV. Geneva Convention.

The Geneva Conventions impose three obligations on the high contracting parties in relation to grave breaches. First, punishment of those violating the Geneva Conventions should be undertaken; the parties are, therefore, called upon to enact the necessary (domestic) legislation criminalizing specific acts in violation of the Conventions. Second, each party is obliged to search for persons alleged to have committed or commissioned grave breaches. Third, persons accused of having committed or commissioned grave breaches must be tried before the national courts, regardless of their nationality or territory where the acts took place; this means in practice that the suspects may be handed over to another state when it has prima facie evidence that the suspect has engaged in such a violation.<sup>120</sup>

The principle of universality of jurisdiction was introduced into the Conventions to facilitate uniform treatment in the repression of grave breaches. However, it has been argued that although numerous states have incorporated clauses providing for such sanctions in their legislations, it is still up to the states to decide how and by whom such measures are to be taken.<sup>121</sup> It is thus said that the system addressing grave breaches in the Conventions is not based on international tribunals, but on national enforcement through legislation and adjudication before national courts. The Geneva Conventions do not preclude trials before any competent international tribunal, as grave breaches have been considered to be international crimes.<sup>122</sup> However, prior to 1993, there had been no prosecution through international jurisdiction.

Criminalization in domestic law for grave breaches and other violations of international humanitarian law by a generic provision may contain a reference to the relevant provisions of international humanitarian law, to international law in general, or to the laws and customs of war (customary law), specifying a range of penalties. However, the significant role of national courts in regulating the conduct of actors engaged in armed conflict is associated with certain weaknesses. These include the fact that the offenses prohibited according to national criminal law often correspond only partly to those normally associated with the conduct of hostilities and the requirements of international humanitarian law, resulting in penalties inappropriate to the context of armed conflicts or to the seriousness of the crimes in question. Governments are

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<sup>120</sup> Gross, Oren. The Grave Breaches System and the Armed Conflict in Former Yugoslavia. *Michigan Journal of International Law* 1995 16(3), page 792. Available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1541&context=mjil>. Accessed 23/1/2022.

<sup>121</sup> Philipe, Xavier. Sanctions for violations of international humanitarian law: the problem of the division of competences between national authorities and between national and international authorities. *International Review of the Red Cross* 2008 90(870), page 361. Available at: [https://international-review.icrc.org/sites/default/files/irrc-870\\_11.pdf](https://international-review.icrc.org/sites/default/files/irrc-870_11.pdf). Accessed 28/1/2022.

<sup>122</sup> Gross, Orten, ref. 119, page 794.



generally reluctant to prosecute their own servants for violations of the laws of war, and courts may be disinclined to act independently of their own governments' political stances.<sup>123</sup>

The inevitable bias, or at least suspicion of bias, by a court at the national level was also associated with the war crimes executed in the Vietnam War. It is, for instance, argued that members of the armed forces who engaged in war crimes were not prosecuted by their countries;<sup>124</sup> the US is known to have prosecuted only two cases for grave breaches in relation to the Vietnam War.<sup>125</sup> In 1969, no US domestic court had jurisdiction over foreign shore grave breaches, leaving former soldiers suspected of war crimes free from possible prosecution.<sup>126</sup>

Although suspects can be handed over to another state, whether or not this state is involved in the conflict, some drawbacks are associated with this solution. States not involved in a conflict have proved reluctant to try suspected offenders. Extradition can also be a problem: If a state is not eager to punish a (possible) war criminal residing in its territory, it may be difficult for another state to secure the transfer. War criminals can therefore avoid prosecution by going to a country that does not have extradition agreements with those that do prosecute.<sup>127</sup> Furthermore, another state involved in the same conflict may not be willing to prosecute enemy personnel because this can be associated with the risk of exposing war crimes committed by the state's own personnel. As for states that did not participate in the conflict at hand, both political and diplomatic considerations and the frequent difficulties in collecting evidence usually discourage state authorities from prosecuting foreigners.<sup>128</sup>

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<sup>123</sup> Verhaegen, Jacques. Legal Obstacles to Prosecution of Breaches of Humanitarian Law. *International Review of the Red Cross*, 1987, page 607.

Available at: <https://international-review.icrc.org/sites/default/files/S0020860400061258a.pdf>. Accessed 1/2/2022.

<sup>124</sup> In April 1971 the United States declared that it would not seek to prosecute United States ex-servicemen who have violated the humanitarian law in Vietnam. Paust, Jordan J. After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts. From the book *The Vietnam War and International Law*, Volume 4. Princeton: University Press, 1976.

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<sup>125</sup> Bassiouni, Cherif. *International Criminal Law, Volume 1: Sources, Subjects and Contents*. Leiden: Martinus Nijhoff Publishers, 2008, page 516. ISBN: 978-90-47-43143-5.

<sup>126</sup> Solis, Gary D. *The Law of Armed Conflict: International Humanitarian Law in War*. Cambridge: University Press 2021, page 80. ISBN: 978-1108926935.

<sup>127</sup> Roberts, Adam. The Laws of War: Problems of Implementation in Contemporary Conflicts. *Duke Journal of Comparative and International Law* 1995, 6(11), page 37. Available at: <https://scholarship.law.duke.edu/cgi/view-content.cgi?article=1358&context=djCIL>. Accessed 15/2/2022.

<sup>128</sup> Cassese, Antonio. On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law. *European Journal of International Law* 1998, 9(1), page 5.

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In case of non-grave breaches, the Convention establishes a right, but not a duty: The state shall “take measures necessary for the suppression of such acts.”<sup>129</sup> It should be noted that violations of Article 3 of the Geneva Conventions do not constitute “grave breaches.” Thus, the torture of prisoners of war in the case of the NLF would not be considered a grave breach of the Geneva Conventions, although it would constitute a grave breach for the soldiers of the parties to the conflict to whom the entire Convention was intended to apply.

In conclusion, as the considerations above show, the Geneva Conventions’ enforcement mechanisms were largely deficient. This is due to the inability to prosecute violators via international courts at the time of the Vietnam War as well as weaknesses in enforcement by national courts.

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<sup>129</sup> ICRC, *The Geneva Conventions of 1949*, ref. 58, Art. 49.

## VI. Conclusion

Armed conflicts are often marked by violations of even the most fundamental rules of IHL, whose role is to limit the effects of wars and protect individuals. It is not necessarily the absence of a law requiring parties to armed conflicts to respect and protect civilians that is causing problems with protection, but rather a failure to comply with the existing norms.

This thesis focused on non-compliance with the Geneva Conventions during the Vietnam War and the possible factors leading the parties to the conflict to violate this important source of international humanitarian law. The research question was defined as follows: Why did the attempts to ensure compliance with the Geneva Conventions fail? My hypothesis was that *non-compliance with the Geneva Conventions was caused by a combination of factors stemming from the individual, communal, and structural levels.*

As this thesis shows, at the state level, one of the main issues was related to the ambiguity of the treaty language and the treaty drafters' failure to anticipate many possible applications. This left space for multiple interpretations of the Conventions, enabling parties to the conflict to dispute its applicability in the Vietnam War.

Furthermore, the application of Article 3 of the Geneva Conventions seemed to be problematic. This article pertains to armed conflicts of a non-international character. The Geneva Conventions were based upon the experiences from World War I and World War II; the drafters did not envision counterinsurgency or guerrilla-type warfare, which was nevertheless not uncommon in the Vietnam War. It proved to be problematic to apply a "conventional" Convention to an "unconventional" war.

For all parties to the conflict, the stakes involved were presumably high enough to outweigh the reputational costs of violating the Convention. It is also argued that compliance with the Geneva Conventions in the Vietnam War was influenced by reciprocity. The parties to the conflict were called upon to respect the Geneva Conventions in 1965 (before the most serious hostilities happened), but not all agreed to adhere to the Conventions during the conflict, even the signatories. Concurrently, the international community's reaction and enforcement system did not appear to be persuasive or deterrent enough.

Despite their obligations in Article 1 of the Geneva Conventions, the international community did not exert sufficient pressure to influence the attitude of the parties to the conflict towards the Conventions. One reason identified is that the Conventions do not make clear how the international community should respond, and specifically, that the wording “ensure respect” in Article 1 is too vague. In addition to the international community, the ICRC can be key in ensuring compliance, given its role in the Geneva Conventions and Statutes of the International Red Cross and Red Crescent Movement, alongside its moral authority. However, the propaganda battle in the Vietnam War and the ICRC’s rejection by some of the parties to the conflict made it difficult for the ICRC to carry out its activities, disseminate and teach about the Conventions, and monitor compliance.

The absence of any central authority capable of enforcing the full range of rules which states and non-state bodies are obliged to follow further complicates reaching compliance with IHL treaties such as the Geneva Conventions. The drafters of the Geneva Conventions did strengthen the enforcement system in comparison to the prior Conventions from the year 1929, including the system of grave breaches. However, the change did not seem to be sufficient at the time of the Vietnam War, and various weaknesses were associated with it. One of its drawbacks was the punishment system based on national enforcement through legislation and adjudication before national courts, since offenses established in national criminal law are often mild by comparison and national bodies often lack the effort to pursue their citizens for acts committed in wars against foreign countries. As a result, sanctions tend to be, in the rare cases in which citizens are charged by national bodies, not appropriate for the gravity of the crimes in question.

Hence, these factors connected to each of the three levels contributed to an environment for non-compliance with the Geneva Conventions in the Vietnam War. Certainly, some played a more important role than others. I argue that the factors creating the environment for non-compliance at the state and structural levels—the question of treaty formulation and interpretation, national interests, and lack of an enforcement mechanism, respectively—are of particular importance. Due to the ambiguous wording of the Geneva Conventions and the absence of a central authority to decide on treaty interpretation, some parties to the conflict even questioned (according to most experts, without justification) the application of the Geneva Conventions. Under such circumstances, it seemed particularly difficult to convince all parties to the conflict of the necessity for the rules and adherence to the principles of the Geneva Conventions.

However, it needs to be mentioned that since the Vietnam War, the Geneva Conventions and humanitarian law as such have undergone significant changes, due to the Conventions' inadequacy in protecting war victims. This resulted in the adoption of the two Additional Protocols to the Geneva Conventions in 1977 to develop and supplement humanitarian norms, which led to the strengthening of the enforcement system and solutions to some of the ambiguities related to the Conventions. For example, states agreed to expand the original list of grave breaches and serious violations of the Conventions in Protocol I, to acts on civilians, prisoners of war, and historic monuments. Also, Protocol II supplemented Article 3 regarding under what circumstances the Conventions should apply in conflicts of a non-international character, enhancing victims' protections amid internal conflicts.<sup>130</sup> Furthermore, new ad hoc international criminal tribunals and courts with jurisdiction over IHL have been established with the aim to improve sanction mechanisms and help tackle the shortcomings of traditional mechanisms based on national enforcement. Evidence of the emergence of a new political will is also the establishment of a permanent International Criminal Court.

Among other positive changes over the last years have been the expansion of the profession of military lawyering and an increase in UN Human Rights Council investigations of wartime law violations. One of the latest developments in the enforcement of humanitarian norms relates to the UN Security Council, which authorizes enforcement actions on behalf of humanitarian goals under Chapter VII of the UN Charter. Nevertheless, the character of this action is ad hoc and inconsistent.<sup>131</sup> Despite all these significant advances, parties to armed conflicts continue not to comply with the rules of international humanitarian law, which indicates that such changes are still unlikely to be sufficient to bring about a complete change in political will and disengagement from practices violating humanitarian law.

The results of this thesis point to the validity of my hypothesis. Hence, the answer to the research question—pertaining to why the attempts to ensure compliance with the Geneva Conventions during the Vietnam War failed—is that a combination of reasons and factors at the

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<sup>130</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). OHCHR. Art. 1, Art. 2 and Art. 16. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and-0>, Accessed 2/3/2022.

<sup>131</sup> Schott, Jared. Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency. *Northwestern Journal of International Human Rights* 2008, 6(1), page 25. Available at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1065&context=njihr>. Accessed 4/3/2022.

individual, communal, and structural levels created an environment for non-compliance with the Geneva Conventions in the Vietnam War.

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# Appendix

**Table 1:** Stages of Norms – Martha Finnemore and Kathryn Sikkink<sup>132</sup>

	<i>Stage 1</i> <i>Norm emergence</i>	<i>Stage 2</i> <i>Norm cascade</i>	<i>Stage 3</i> <i>Internalization</i>
<i>Actors</i>	Norm entrepreneurs with organizational platforms	States, international organizations, networks	Law, professions, bureaucracy
<i>Motives</i>	Altruism, empathy, ideational, commitment	Legitimacy, reputation, esteem	Conformity
<i>Dominant mechanisms</i>	Persuasion	Socialization, institutionalization, demonstration	Habit, institutionalization

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<sup>132</sup> Finnemore, Martha and Sikkink, Kathryn, ref. 22, page 898.



Charles University  
Faculty of Social Sciences  
Department of Political Science

Diploma thesis project

**Non-compliance with International Norms - the Geneva  
Conventions of 1949 and the Vietnam War**



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**Academic advisor:** JUDr. Miroslav Pulgret, Ph.D.

**Study Programme:** International Relations

**Year of project submission:** 2021

## Introduction to the topic

In June 1965, the International Committee of the Red Cross (“ICRC”) in accordance with its humanitarian tradition wrote to the parties of the Vietnam War. The ICRC appealed in its letter that regulations of humanitarian law should apply to the hostilities in Vietnam because “they have assumed such proportions that there can be no doubt they constitute an armed conflict.”<sup>133</sup>

A major part of international humanitarian law is contained in the four Geneva Conventions of 1949 and their Additional Protocols, which were adopted in 1977 and 2005. Their objective is to regulate the conduct of an armed conflict and to limit its effect. The first and the second Geneva Conventions focus on the protection of soldiers who are *hors de combat* (out of the battle), both on land and at sea. The third Geneva Convention concerns the specific treatment of prisoners of wars (“PoW”) and the fourth Geneva Convention aims at the protection of civilians of an armed conflict. Except for their common Article 3, which extends the general protection to “conflicts not of an international character”, the other articles refer to international conflicts. The effort to provide greater protection to the victims of not only international but also internal armed conflicts led to the adoption of two Additional Protocols in 1977. This was, however, done after the Vietnam War. The conflict in Vietnam could therefore be subject only to the regulations of the four Geneva Conventions of 1949.

According to the ICRC, the Geneva Conventions were binding for all the parties involved in the Vietnam War.<sup>134</sup> However, the appeal of this humanitarian organization reminding the parties of the conflict of their obligations to the Geneva Conventions led to disapproving reactions of the Democratic Republic of Vietnam (“North Vietnam”), as well as of the National Liberation Front of South Vietnam (“NLF”). Both parties refused to apply the Geneva Conventions to the Vietnam War. Alleged violations of the Geneva Conventions, did, however, not only concern North Vietnam and the NLF, which refused to recognize their validity in the context of the Vietnam War until the end of the conflict. The United States (“US”) and the Republic of Vietnam (“South Vietnam”) breached the said Conventions too, despite their original promise and reassurance to abide by it. Objections to the ambiguities of the Geneva Conventions, lack of concern of the parties involved to follow them, insufficient pressure from the international

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<sup>133</sup> International Committee of the Red Cross. Respect for the rules of humanity in Vietnam“. IRRC 53 (5). 417418. <https://international-review.icrc.org/sites/default/files/S0020860400015394a.pdf>. Accessed 5. 9. 2021.

<sup>134</sup> In this thesis, the focus will be on the position of the United States, the Democratic Republic of Vietnam, the Republic of Vietnam, and the National Liberation Front of South Vietnam in relation to the Geneva Conventions of 1949

community as well as weak enforcement and control mechanism led to the question of whether the Geneva Conventions can be applied to modern conflicts and can protect those who need it.

The aim of this thesis is to answer, why the attempts to ensure the application of the Geneva Conventions to the Vietnam War failed. In examining this question, the focus of this thesis is not limited to the state-centric approach. Besides the question of the interests of the parties involved in the conflict and their capability or desire to comply with the rules, attention is also paid to the role of the international community and the question of the enforceability of international humanitarian law.

## **Research target, research question**

The focus of the thesis will be on the examination of reasons that prompted the US, North and South Vietnam as well as the NLF to act in violation of the Geneva Conventions, to which they were, according to the ICRC, bound. At the causes of non-compliance will be looked at three levels: individual (parties of the conflict), communal level (international community), and structural level (law enforcement, maintenance, and control).

The research question is defined as follows:

Why did the attempts to ensure compliance with the Geneva Conventions fail?

## **Literature Review**

The number of studies dealing with the Geneva Conventions in the context of the Vietnam War is modest and to this time, there is no detailed study describing the reasons why the application of the Geneva Conventions to the conflict in Vietnam was unsuccessful. With my thesis, I aim at filling this gap.

The thesis will rely on primary as well as secondary source material. The methodology is based on the work by Jacob Katz Cogan, who classifies the sources of non-compliance into three groups: individual, communal, and structural.<sup>135</sup> For other chapters related to the Geneva Conventions and the reasons for their violation the text of the Geneva Conventions will be used, as

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<sup>135</sup> Cogan, K.J. (2006). Noncompliance and the International Rule of Law. *The Yale Journal of International Law* 31. 194-195. <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1264&context=yjil>. Accessed 20. 8. 2021.

well as records from the archive of the ICRC and other documents from online archives. Among the secondary sources are various books and academic articles related to the topic of the thesis, written in English, German or French, including for instance *La Croix-Rouge et la révolution indochinoise* written by Michel Barde<sup>136</sup> or *Revisiting the Vietnam War and international law: views and interpretations* by Richard Falk<sup>137</sup>.

## **Methodology**

For the purposes of my work, I will apply a qualitative approach and make an observation by using a single-case study analysis.

To answer the research target (why the attempts to ensure compliance with the Geneva Conventions failed), the causes of non-compliance will be described at three levels – individual, communal, and structural.<sup>6</sup> The added value of the division into these three groups is the consideration of the substate dynamics.

To introduce the single levels:

### **Individual level**

The first premise is that the decision of individuals (most frequently states) to comply with a legal act results from their capacity or incapacity, but also their desire. If an actor lacks financial or technological means to comply with the law, it is considered as incapacity-based non-compliance. On the contrary, scholars talk about capacity-based non-compliance, when an individual's capacity enables to comply with the law, but it is intentionally violated because of the consideration of individual's interests or cost-benefits calculations.

### **Communal level**

The second level is associated with the international community, whose task is to create, internalize and manage the norms. The process of international socialization (mechanism for promoting norms with the aim to convert „norm breakers“ to „norm followers“) and the impact of

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<sup>136</sup> Barde, M. (1975). *La Croix-Rouge et la révolution indochinoise : histoire du Comité International de la Croix-Rouge dans la guerre du Vietnam*. Geneva: Asian Documentation and Research Center of the Graduate Institute of international Studies in Geneva

<sup>137</sup> Falk, R. (2017). *Revisiting the Vietnam War and International Law*. Cambridge: Cambridge University Press.  
Cogan, K.J. (2006). Noncompliance and the International Rule of Law. *The Yale Journal of International Law* 31. 194-195. <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1264&context=yjil>. Accessed 20. 8. 2021.

collateral consequences are important for explaining how at the community level the conditions that may prompt non-compliance are created.<sup>138</sup>

## **Structural level**

Finally, it is argued that the non-compliance is caused because of the international system's structural weaknesses when it comes to law maintenance, enforcement, and control. The reason for this is that international law relies heavily on private and peer-to-peer enforcement.<sup>139</sup>

## **Research hypothesis**

Based on the above-mentioned information and prior evidence, a tentative answer to the research question is formulated into the following hypothesis:

*H: Non-compliance with the Geneva Conventions was caused by a combination of factors stemming from the individual, communal, and structural levels.*

## **Planned thesis outline**

- I. Introduction**
- II. International law and (non)compliance**
- III. The Geneva Conventions of 1949**
  - Application of the Geneva Convention to the Vietnam War
- IV. Causes of non-compliance with the Geneva Conventions of 1949**
  - Individual Level
  - Communal Level
  - Structural Level
- V. Conclusion**

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<sup>138</sup> Finnemore, M. and Sikkink, K. *International Norm Dynamics and Political Change*. 902.

Hathaway, O. A. (2005) *Between Power and Principle: An Integrated Theory of International Law*. 473.

<sup>139</sup> Hathaway, O. A. (2005) *Between Power and Principle: An Integrated Theory of International Law*. 492

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