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A Matter of Principle(s)? Acquiescence in International Humanitarian Law

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11–14 minutes

Like hidden bunkers blended in the landscape, the operation of general principles of law in international humanitarian law (IHL) is not conspicuous at first glance. When referring to general principles (International Court of Justice (ICJ) Statute, art. 38(1)(c)) in the context of IHL, the first thought is generally directed toward the IHL principles of military necessity, distinction, proportionality, and precautions. One also thinks of the Martens Clause, providing for the "the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

The purpose of this post is to examine the relevance of general principles of law, particularly through the example of acquiescence. More particularly, the application of general principles external to IHL in IHL is rarely discussed. This post begins with an overview of general principles of law, outlines the fundamental elements of acquiescence, lists several cases of applications, and identifies some other such "external" general principles of law that may be relevant to IHL.

General Principles of Law

General principles of law (GPL) have a long history, they have been the subject of extensive scholarship, and may be defined as short formulations expressing a legal concept or notion. They may, for example, take the form of a prohibition (abuse of rights), an obligation (good faith), a derogation (state of necessity), or a general duty (due diligence). The vague nature of GPL is both a weakness and a strength: a weakness due to their low degree of precision; and a strength due to their role as a guiding framework in response to legal developments.

The ongoing work of the International Law Commission (ILC) highlights several functions of principles, including gap-filling (avoiding *non liquet*) and interpreting and supplementing treaty provisions (ILC, Third Report on GPL 2025, p. 43, § 122). GPL may be "derived from national legal systems" through comparative analysis or may instead be "formed within the international legal system." GPL are often forgotten because they give rise to treaty provisions or customary rules that enjoy greater visibility (e.g., the principle of reparation, now expressed in the law of international responsibility).

It should be noted, however, that the reverse movement is also possible: the accumulation of treaties and customary international law sharing a common core may be the source of a GPL (ILC, First Report on GPL 2019, p. 52, § 173). GPL are primarily invoked in a judicial context (ILC, Second Report on GPL 2020, p. 54, § 177). Ultimately, it is through the work of courts and

litigants (who are themselves drawing from doctrinal analyses) that GPL are "recognized," applied, defined, and established.

Acquiescence as a General Principle of Law

In a nutshell, acquiescence is a chronological process resting on three different, but interrelated steps: a *claim* by subject A in the widest sense; *knowledge* of the claim by subject B; *silence*, *defective reaction*, or *lack of protest* by subject B. When all requirements are satisfied, subject B is deemed to have "acquiesced" to the claim put forward by A, resulting in the creation of a new legal situation between them.

The last time the ICJ expressly tackled the principle, in *Somalia v. Kenya* (2021), it was framed as follows,

acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent. … If the circumstances are such that the conduct of the other State calls for a response, within a reasonable period, the absence of a reaction may amount to acquiescence. … This is based on the principle "*qui tacet consentire videtur si loqui debuisset ac potuisset*."

The simple process of acquiescence is pervasive in public international law. It can be partially found in treaties (Convention on Enforced Disappearance, art. 2), in customary international law (occupation of territory), in the working of international organizations (acquiescence of the UN General Assembly to *ultra vires* acts of the UN Security Council), etc. IHL is no exception. Acquiescence is featured in various articles of the 1949 Geneva Conventions and of the 1977 First Additional Protocol (AP I).

Acquiescence in International Humanitarian Law

Acquiescence in IHL operates in a slightly modified form regarding general international law, e.g., in the context of territorial claims. In the latter, acquiescence operates in its mold as a norm for passivity and silence in the first place. Conversely, in IHL, acquiescence is an alternative means of fulfilling the consent requirement enshrined in some IHL provisions. Consent can then be given strongly (explicitly, as a legal act) or weakly (impliedly, by deeds and relevant silence). The latter is then the proper domain of acquiescence and is distinct from direct consent.

Acquiescence-relevant situations are sometimes codified into Geneva Convention provisions, the main elements of the principle being adapted for the purpose of the regulation at stake (as good faith is embedded into the prohibition of perfidy). In such cases, we are faced with duality, as already mentioned: either a State accepts a certain course by explicit utterances, or it does so by deeds and relevant silence. The first limb is an agreement as a legal act, the second leads to acquiescence proper.

There is no neat boundary between these situations. Even if they do not merge into one another, there are cases that lie on the boundary between both categories. For instance, in Geneva Convention (GC) III, Article 4(a)(2), the formula "Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict … " acts as a referral to acquiescence. As stated in §§ 1004 and 1007 of a 2020 International Committee of the Red Cross (ICRC) commentary, the "belonging" requirement is also fulfilled through acquiescence of the State to the actions of the armed groups.

In such cases, the working of acquiescence is close to a tacit agreement, to the point where *almost* every provision that requires "consent" or an "agreement" can also be fulfilled through acquiescence (see GC IV, art.7; ICRC, *Commentary*, § 1190 (2025)). Many IHL provisions provide for "special agreements." It has been remarked that Common Article 3(3) is also fulfilled thanks to "other means of commitment" (ICRC, *Commentary*, § 858 (2016)). Acquiescence is also a candidate for binding armed groups. For instance, the mere adoption by the armed groups of a code of conduct proposed by the State may be read as acquiescence, and thus amount to a special agreement to bring IHL provisions into force (acquiescence being also relevant to Vienna Convention on the Law of Treaties, art. 35). Acquiescence here serves to expand the realm of IHL and to oil its wheels.

However, the reach of acquiescence as a substitute to consent is not unlimited. First, some provisions explicitly require a written agreement (GC IV, art. 15(2); AP I, art. 60(2)). Second, certain provisions limit the reach of acquiescence within certain boundaries. For instance, a party experiencing duress is deemed not in a position to acquiesce (GC II, art. 10(5), this more generally flows from the GPL of acquiescence itself. Another case in this second category involves special agreements that prohibit derogating from certain protections (GC I, II, III, IV, common arts. 6(1) and 7(1)). Third, even if a provision does not exclude acquiescence, there are cases where it should be discarded as a matter of interpretation. Given the protective purpose of article GC III, Articles 100(1) and (2) ("[o]ffences shall not thereafter be made punishable by the death penalty without the concurrence of the Power upon which the prisoners of war depend"), the "concurrence" or "consent" cannot be fulfilled through mere acquiescence. The Martens Clause is essential here, and acts as a guide. Acquiescence (or any other GPL) must be *fine-tuned* to the framework, values, and goals of IHL.

Finally, there are more diffuse cases of operation of our principle. For instance, the *knowledge* requirement under acquiescence may be "actual" when an actor really knows a claim or a fact, or "constructive" when an actor cannot plead ignorance of a fact. For instance, Rule 152 of the *Tallinn Manual 2.0 on Cyber Warfare* provides, "A neutral State may not *knowingly* allow the exercise of belligerent rights by the parties to the conflict from cyber infrastructure located in its territory or under its exclusive control." In other words, it may neither accept nor acquiesce in such a course.

General Principles of Law other than Acquiescence

Several other principles of general international law (and not specific to IHL) also apply in IHL. Thus, the principle *ex iniuria ius non oritur* (rights do not flow from illegal behavior) is relevant for the law of occupation, it underpins the nullity of an act adopted by an illegal authority under occupation law. The principles governing the "good administration" of the occupied territories are emphasized by Arai-Takahashi. The principle of "due diligence" is always worth considering in matters like precautions before an attack, evaluation of new weapons, or duties of the neutral. The "duty to investigate" breaches and violations of IHL is also a good candidate to be a GPL. Under the GPL *nemo ex propria turpitudine commodum capere potest* (no one can be heard to invoke his own wrong), it can be argued that a party may not create a situation that provokes the loss of IHL protection and then invoke the loss for its own benefits.

Conclusion

Save for references paid to procedural general principles in GC IV, Article 67 (principles related to criminal proceedings) and AP I, Article 75(4) (principles of regular judicial procedure), the Geneva Conventions and Additional Protocols do not encompass provisions that emphasize

the applicability of general principles of international law in IHL. In IHL scholarly works devoted to source analysis, treaties, CIL, and general principles *specific* to IHL, the operation of GPL is rarely mentioned.

However, silence regarding GPL in no way means that such principles are not relevant or applicable in IHL. GPL are listed, among others, in works by Cheng and Đorđeska. The use of GPL can be useful when new fields of law are under construction in IHL (cyber warfare, militarization of space, autonomous weapons) or to interpret and complement specific rules. They may also oil the wheels of rules of IHL, like acquiescence, whose main function in IHL is to plasticize the way consent may be given or an appurtenance can be construed when a provision requires it. In general international law, acquiescence more often takes the place of consent as an alternative (consent not required, acquiescence suffices). In IHL, it describes rather a way to see the required consent as being given. In short, in general international law acquiescence marks an escape from consent, in IHL, it is a modality of realizing required consent.

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