

The Enforcement of International Humanitarian Law: Challenges and Achievements

Gentian Zyberi

Norwegian Centre for Human Rights

University of Oslo

Structure

- Main methods and mechanisms of enforcement of IHL
- Characteristics and development of enforcement mechanisms over time
- Concluding remarks

Problems with IHL Enforcement

- Challenges in the implementation/enforcement of IHL/LOAC are endemic to international law generally (see Kolb & Hyde, p. 284-5):
 - System based on voluntary action and goodwill of the parties;
 - Most relevant mechanisms are of a normative rather than of an institutional nature.
- New institutional developments and practice have remedied this problem to some extent.

Implementation and Enforcement: Nature of Obligations and Relevant Mechanisms

- During peacetime *vs.* in or after armed conflict (environment)
- Domestic and International Implementation (level)
- Legal and non-legal measures (nature)
 - Incorporation of IHL in domestic law and dissemination
 - Protecting Power/ICRC
 - Obligation to respect and ensure respect
 - Fact-finding Commission
 - Criminal Prosecution of IHL violations
 - Domestic courts – universal jurisdiction
 - International and internationalized courts
 - Human rights bodies (Human Rights Council and others)
 - United Nations/ Security Council and other UN organs
 - National Red Cross and Red Crescent Societies
 - Non-governmental organizations

Factors Inducing Compliance with IHL

- Reciprocal interests (Wolfrum & Fleck, pp. 686-7)
- Public opinion
- Maintenance of discipline
- Fear of reprisals
- Penal and disciplinary measures
- Liability for compensation
- Activities of Protecting Powers
- International fact-finding
- Activities of the ICRC
- Activities of the United Nations
- Diplomatic activities
- Activities of non-governmental organizations
- National implementing measures
- Dissemination of IHL
- Personal conviction and responsibility of the individual.

Peacetime Implementation Mechanisms

- *Dissemination*
 - GCs: Art. 47, 48, 127, 144; AP I: Art. 83, 87(2); AP II: Art. 19
 - AP I, Article 87(2): “In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.”
- *Incorporation into domestic law*
 - GCs Art. 49, 50, 129, 146: “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention...”
- *Societal Structure and Organization*
 - E.g., Location of military objectives away from civilian objects.

Implementation During Armed Conflict

- *Protecting Power*
 - GCs I-III, Art. 8; GC IV, Art. 9; P I, Art. 5: “The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict.”
 - Rarely used (five instances since WWII).
- *ICRC*
 - Principle of neutrality and confidentiality
 - Treaty- and statute-based activities
 - Neutral intermediary
 - Protected persons oversight, registration, and tracing
 - Humanitarian relief
 - Good offices
 - Substitute for Protecting Power

International Mechanisms

- United Nations System
 - Article 1: Focused more on maintaining or restoring peace, not on regulating war or implementing IHL once peace has been breached.
 - Reference to int'l human rights.
- Security Council (POC)
 - Chapter VII: respond to threats to and breaches of the peace.
 - Article 41: Measures not involving the use of force.
 - Article 42: Military action.
- General Assembly
 - Article 10: May make recommendations on areas of U.N. competence.
- Regularly reminding parties to an armed conflict of their IHL obligations (SC and GA Resolutions).

Other Mechanisms

- Negotiation, Mediation, Good Offices, etc. by the UN or other international/regional organizations
- Media Campaign and Public Relations
- NGO fact finding, publication, ‘naming and shaming’
- Reprisals?

Reciprocity and Reprisals

- A violation of IHL undertaken in order to force compliance by an adversary.
- The opportunity to engage in reprisals is limited by the following principles:
 - **Last resort** in attempts to impose compliance by the adversary with legal standards.
 - **Prior warning** has been given which has failed to bring about the discontinuance of the adversary's crimes.
 - **Special precautions** before implementing them.
 - **Principle of proportionality applies:** they must not be excessive compared to the precedent unlawful act of warfare and must stop as soon as the unlawful act has been discontinued.
 - Subject to “**elementary considerations of humanity**” & the Martens Clause:

“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.” *Prosecutor v. Zoran Kupreškić*, Judgment, para. 527 et seq. (Jan. 14, 2000).

Reprisals Against Civilians?

- Why problematic?
- Civilians in combat zones: reprisals against them are prohibited by AP I, Art. 51(6):
 1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. ...
 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. ...
 3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.
 4. Indiscriminate attacks are prohibited. ...
 6. Attacks against the civilian population or civilians by way of reprisals are prohibited.
- AP I, Article 52(1): Outlawing reprisals against civilian objects.
- Are reprisals still lawful?
 - Means & methods? E.g. prohibited weapons.
 - Increasingly disfavored in light of other enforcement mechanisms and the expansion by treaty of protection for individuals who may be the object of reprisals.

State Responsibility and Individual Criminal Responsibility

- Long pedigree of individual criminal responsibility under the customary laws of war.
- Treaty precursors to the 1949 Geneva Conventions premised on state (civil) responsibility.
 - Reparations
 - Diplomatic or territorial concessions
- Nuremberg/Tokyo proceedings following WWII triggered a shift in emphasis.

Nuremberg/Tokyo Proceedings



War Crimes at Nuremberg/Tokyo

- Nuremberg Charter, Article 6(b) criminalized “War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to,
 - murder,
 - ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory,
 - murder or ill-treatment of prisoners of war or persons on the seas,
 - killing of hostages,
 - plunder of public or private property,
 - wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.”

Crimes against the Peace and Crimes Against Humanity

- Crimes Against the Peace: “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy [to do so].”
 - The crime of aggression in today’s lexicon.
- Crimes Against Humanity: “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

Codification of International Criminal Law Post-WWII

- Genocide Convention (1948)
- Geneva Conventions (1949)
- The Convention on the Abolition of the Statute of Limitations on War Crimes and Crimes against Humanity (1968)
- Apartheid Convention 1973
- Two Additional Protocols to the Geneva Conventions (1977)
- Convention Against Torture (1984)
- International Law Commission: Draft Statute for an International Criminal Court (1994); and Draft Code of Crimes against the Peace and Security of Mankind (1996)
- Statutes of the ad hoc tribunals for Yugoslavia and Rwanda (1993 and 1994) and the 1998 Rome Statute of the ICC
- Internationalized criminal Tribunals (SCSL, ECCC, etc).

Categories of War Crimes

- 1. War crimes against persons requiring particular protection.
- 2. War crimes against property and other rights.
- 3. Prohibited methods of warfare:
 - A) attacks on non-military targets;
 - B) other prohibited methods.
- 4. Prohibited means of warfare.
- 5. Crimes against humanitarian assistance and peacekeeping operations.

Grave Breaches Regime (1)

- Grave Breaches regime central to the enforcement of the 1949 Geneva Conventions/ applicable to international armed conflicts.
- Enforcement and deterrence hinges on individual criminal responsibility
- Premised on universal jurisdiction
 - “Each HCP shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”
 - Extradition option: *Aut dedere aut judicare*.
 - Extraterritorial obligations?

Grave Breaches (2)

- GCs I & II Art. 50, 51: “Grave breaches ... shall be those involving any of the following acts, if committed against persons or property protected by the Convention:
 - willful killing,
 - torture or inhumane treatment, including biological experiments,
 - willfully causing great suffering or serious injury to body or health, and
 - extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.”
- GC III Adds:
 - “compelling a prisoner of war to serve in the forces of the hostile party, or
 - willfully depriving a prisoner of war of the rights of fair and regular trial prescribed by this Convention.”
- GC IV Adds:
 - “unlawful deportation or transfer or unlawful confinement of a protecting person,
 - compelling a protected person to serve in the forces of a hostile Power, or
 - willfully depriving a protected person of fair and regular trial, [and]
 - taking of hostages...”
- Victim must be a “protected person” and impacted property must be “protected.”

Protected Persons

- Art. 13, 24, 25, 26 GC I: Wounded and sick members of the armed forces and medical personnel.
- Art. 13, 36, 37 GC II: Wounded, sick and shipwrecked members of the armed forces and medical, religious, etc. personnel.
- Art. 4, GC III: Prisoners of war “who have fallen into the power of the enemy.”
- Art. 4, 20 GC IV: “[T]hose who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. ... Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”
 - Catch all: applies where one of the other three Conventions does not apply.

War Crimes in Non-International Armed Conflict

- CA 3 and AP II are silent as to individual criminal responsibility. Implications?
- Jurisprudence has extended individual criminal responsibility to non-international armed conflicts.
- Violation of *nullum crimen sine lege*?
 - *Prosecutor v. Tadić*: “customary international law imposes criminal liability for serious violations of common Article 3 ... and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”
Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 134 (2 Oct. 1995).
- Article 8 of the ICC Statute has almost collapsed the distinction *re* criminal responsibility!

War Crimes in the ICC Statute (Art. 8)

- Consolidates much of Hague & Geneva law:
 - Grave and other Breaches of the Geneva Conventions
 - Violations of Common Article 3 & parts of AP I and II
 - “Hague” Means & Methods Violations
 - Much overlap, but IAC provisions are more extensive:
 - E.g., Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
 - Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives.
 - Weapons crimes (poison weapons, dum dum bullets, etc.)

Nexus to Armed Conflict

- Conduct must have a nexus to the armed conflict to constitute a war crime.
 - *Tadić*: closely related to the armed conflict as a whole.
 - *Kayishima*: “a direct link between crimes committed against these victims and the hostilities.”
 - *Kunarac*: the conflict “played a substantial part in the perpetrator’s ability to commit [the charged crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”
 - *Kunarac*: it is enough if “the perpetrator acted in furtherance of or under the guise of the armed conflict.”
 - ICC: the conduct “took place in the context of and was associated with” an armed conflict.
- If no nexus:
 - The act may be another international crime (e.g., a crime against humanity, terrorism, or genocide).
 - The act may be a domestic crime (e.g., murder, mayhem, rape).

Theories of Responsibility

- Direct liability: committing, ordering, instigating
- Accomplice liability: aiding and abetting
- Conspiracy
 - Genocide
- Joint Criminal Enterprise: an individual who knowingly and voluntarily joins a criminal enterprise can be held liable for all crimes—either intentional or foreseeable—committed by the enterprise.
- Co-Perpetration
- Superior/command responsibility

Superior Responsibility

- Originally uncodified in the GCs.
- AP I: *Reaffirms duty of responsible command & codifies command responsibility*

Article 86: Failure to Act ...

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his **superiors** from **penal or disciplinary responsibility**, as the case may be, if they **knew, or had information** which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they **did not take all feasible measures within their power to prevent or repress the breach**.

Article 87: Duty of Commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, **to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol**. ...

3. The **High Contracting Parties and Parties to the conflict shall require any commander** who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary **to prevent such violations of the Conventions or this Protocol**, and, where appropriate, **to initiate disciplinary or penal action against violators thereof**.

Responsibility of Commanders and Other Superiors under Article 28 of the ICC

- (a) A ***military commander*** or ***person effectively acting as a military commander*** shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her *effective command and control*, or *effective authority and control* as the case may be, **as a result of his or her failure to exercise control properly over such forces**, where:
- (i) That *military commander or person* either **knew or**, owing to the circumstances at the time, **should have known** that the forces were committing or about to commit such crimes; and
 - (ii) That *military commander or person* **failed to take all necessary and reasonable measures** within his or her power to **prevent or repress** their commission or to **submit the matter to the competent authorities** for investigation and prosecution.
- (b) With respect to superior and subordinate relationships **not described in paragraph (a)**, a superior shall be ***criminally responsible*** for crimes within the jurisdiction of the Court committed by subordinates under his or her *effective authority and control*, as a result of his or her ***failure to exercise control*** properly over such subordinates, where:
- (i) The superior either **knew, or consciously disregarded information which clearly indicated**, that the subordinates were committing or about to commit such crimes;
 - (ii) **The crimes concerned activities that were within the effective responsibility and control of the superior; and**
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Domestic and International Judicial Mechanisms

- After Nuremberg/Tokyo proceedings, a hiatus in international jurisdiction.
- Presumption of domestic enforcement.
- Revival of international jurisdiction after the tragic events in Srebrenica (Bosnia and Herzegovina) and Rwanda and the SC establishing the two ad hoc tribunals for the former Yugoslavia and Rwanda.

Courts Martial

- Courts martial: military courts that prosecute individuals subject to military law (e.g. US Uniform Code of Military Justice (UCMJ)), including the laws of war, such as:
 - Members of the military
 - POWs
 - Civilians (e.g., under martial law or occupation)

International Judicial Mechanisms

- International Court of Justice: State Responsibility
 - Article 34: Jurisdiction over disputes between states that have accepted its jurisdiction.
 - *Nicaragua v. United States*, 1986 ICJ Reports: holding that violations of IHL committed by the *contras* could not be attributable to the United States, because the United States did not exercise “effective control” over the *contras*, notwithstanding that the United States was “training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua.”

International Criminal Tribunals

- *Ad hoc* criminal tribunals
 - International Criminal Tribunal for the Former Yugoslavia & Rwanda
 - Established pursuant to Chapter VII of the U.N. Charter as a response to breaches of international peace & security in those countries.
 - Hybrid Tribunals: Established by Agreement between the United Nations and the Host nation or by virtue of a U.N. transitional authority:
 - Special Court for Sierra Leone
 - East Timor Special Panels
 - Bosnian War Crimes Chamber & Kosovo Panels
 - Extraordinary Chambers in the Courts of Cambodia
- Permanent International Criminal Court.



International Criminal Court

- Entered into force: 1 July 2002 with 60 ratifications.
- Art. 5-8: Subject matter jurisdiction over genocide, crimes against humanity, war crimes and eventually aggression.
 - Article 8(1): “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”¹
 - Art. 124: “Transitional Provision: ... a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory.”
- Art. 12: The state of nationality or territorial state must be treaty parties.
- Art. 13: Prosecutions may be triggered by Security Council, State Parties to the Rome Statute, and Prosecutor acting *proprio motu*.
- Art. 16: Must defer an investigation if the Security Council, acting under Chapter VII, so requests.
- Art. 17: Must defer to national systems unless they are unwilling or unable to investigate or prosecute a crime that otherwise would be under the Court’s jurisdiction.

Concluding Remarks

- Enforcement of IHL happens at different levels and through different methods and mechanisms.
- War crimes are those violations of the laws of war that trigger individual criminal responsibility and State responsibility.
- There should be a nexus with an armed conflict.
- The grave breaches provisions only apply in international armed conflicts.
- Different mechanisms have been established to enforce IHL.
- Some mechanisms are obsolete, whereas others have taken on important functions.