Implementation and enforcement of IHL [1]

War anywhere is first and foremost an institutional disaster, the breakdown of legal systems, a circumstance in which rights are secured by force. Everyone who has experienced war ... knows that unleashed violence means the obliteration of standards of behaviour and legal systems ... the idea [of international humanitarian law] is to persuade belligerents to accept an exceptional legal order ... specially tailored to such situations. That is precisely why humanitarian action is inconceivable without close and permanent dialogue with the parties to the conflict.

(Frederic Maurice, ICRC delegate, killed in 1992 in Sarajevo.)

The implementation and enforcement of international law in general and IHL in particular is problematic. The international legal system is based on the notion of the sovereign equality of States, and, generally speaking, no State may interfere in the internal affairs of another sovereign State.

This means that enforcement of international law is decentralised – there is no central authority for enforcement, in the same way that domestic legal systems have police forces, courts, and governments. This is especially complex in regard to IHL. With a few exceptions, implementation and enforcement of IHL is often voluntary, and there are no compulsory means for the settlement of disputes or for ensuring enforcement of IHL. While duties are imposed under IHL, there are few sanctions that can be imposed on a State that fails to abide by those duties.

Despite the seemingly bleak prospects for adherence to the principles of IHL, States do attempt to fulfil their obligations under IHL. This is done by means of measures undertaken both in times of peace and war.

Measures in times of peace

States are obliged to ensure that preventative measures are taken to ensure respect for and understanding of IHL. The first of these is ensuring that the relevant treaties of IHL are implemented domestically in the form of legislation. Thus, in Australia, we have the Geneva Conventions Act 1957, which gives domestic legal effect to the Geneva Conventions. In addition to enacting legislation domestically, parties to the Conventions and Protocols are obliged to ensure that IHL is disseminated through the population. This is done in a number of ways. First, States must ensure that instruction is given to the armed forces on matters of IHL. This includes the creation of military manuals which outline the laws of armed conflict applicable to that State; integration of IHL into the rules of engagement; and the provision of regular training in IHL for the armed forces. Instruction in IHL should also be provided for the police forces of a State.

In addition to instruction to the military, there is an obligation for States to disseminate the principles of IHL as widely as possible throughout civil society. This can be fulfilled through the teaching of IHL in universities and schools, as well as through public education programs.

Measures in times of war

In time of war, the need to respect and ensure respect for IHL is obviously paramount. This principle is expressed in the Geneva Conventions in Common Article 1. Common Article 1 provides that parties to the Convention ‘undertake to respect and to ensure respect for the present Convention in all circumstances.’ According to this principle, it is the responsibility of both the affected State, and all States parties to the Convention, to ensure that breaches of the Convention are halted. What this means in practice is less clear, but generally speaking, under Common Article 1, any State injured by a violation of IHL can take all measures permissible under international law generally, and IHL specifically, to ensure respect for IHL.

Protecting Powers

More practical means of ensuring respect for the rules of IHL can be found in recourse to what are known as the Protecting Powers. The concept of ‘protecting powers’ is borrowed from international diplomatic law. Under international diplomatic law, foreigners abroad enjoy diplomatic protection by their State. However, when such
diplomatic protection does not exist, due, for instance, to diplomatic relations being severed between States, States may choose to appoint a third State to act as a protecting power. This third State then operates to protect the interests of the State and its nationals. For a protecting power to be appointed, all three States must agree to cooperate in such a manner. In IHL, Protecting Powers are thus neutral States who agree to look after the interests of the parties to the conflict, where diplomatic relations have broken down due to the conflict. The Conventions therefore contain numerous provisions that make reference to Protecting Powers, including tasks such as visits to protected persons in detention; supervision of relief missions or evacuations; and assistance in judicial proceedings against protected persons.

Case Study: Charles Taylor

Charles Taylor was President of Liberia from 1997 to 2003. Taylor was indicted by the Special Court for Sierra Leone in 2003 on 11 charges of war crimes, allegedly committed between 1996 and 2002, during the Sierra Leone civil war. The crimes included murder, rape, sexual slavery, enslavement, mutilation, and recruiting and using child soldiers. It was this last charge regarding child soldiers that formed the basis of the charges before the Special Court, which heard Taylor’s case in The Hague, rather than the Liberian capital, Monrovia. It was claimed that Taylor supported rebel groups in nearby Sierra Leone, as part of a plan to control the diamond fields located in that country.

Taylor was arrested after resigning as President, following a period of exile in Nigeria. He was extradited to The Hague in 2006, as it was thought that holding the trial in Liberia could be politically destabilising for the country, especially as Taylor still held support in certain parts of the country. Taylor pleaded not guilty to all charges, claiming he was actually the peace-keeper during the civil war; he also denied having received any so-called ‘blood diamonds’ from Sierra Leonean rebels. Taylor took that stand in his own defense, with his testimony lasting nearly seven months. The trial concluded in 2011, with judgment handed down in May 2012. Taylor was found guilty on all 11 charges and was sentenced to 50 years in prison.

The Role of the ICRC

In addition to having Protecting Powers, the International Committee of the Red Cross plays an important role in the observance and respect for IHL. In time of armed conflict, the ICRC serves as a neutral independent body, working with all parties to the conflict to help all victims of armed conflict. Their work involves numerous tasks, such as visits to persons in detention (both in international and non-international armed conflicts). During visits, interviews are conducted to check on the conditions of detention, and to ensure the well-being of detainees. The interviews are conducted without witnesses and the detaining power is not permitted to discover what has been said by detainees. If the ICRC finds that detention facilities are not maintained to the standard required by the Conventions, the ICRC will approach the State in question, confidentially and without revealing information regarding sources, and work with the State to improve the detention facilities and the condition of the detainees. Only rarely will the ICRC ‘go public’ with their concerns regarding the acts of States in armed conflict, preferring instead to rely on confidential negotiations with States.

The ICRC also undertakes the provision of relief supplies and medical assistance to victims of armed conflicts. The ICRC also serves as a neutral and independent repository of information on persons affected by armed conflict – specifically the missing, sick, wounded, shipwrecked, detained or imprisoned. The ICRC operates a tracing service for people to attempt to find their loved ones, and to keep track of persons caught up in conflict zones. The ICRC’s humanitarian initiatives vary according to the type of armed conflict. In international armed conflicts, the ICRC has a guaranteed right to provide humanitarian assistance to States; under Article 81 of Protocol I, States are obliged to accept the assistance of the ICRC. However, in non-international armed conflicts, the ICRC has no such guaranteed right; it may only offer such services, with States under no obligation to accept the offer.

The International Fact-Finding Commission

Another avenue for ensuring respect for IHL is the International Humanitarian Fact-Finding Commission. The Commission was created pursuant to Article 90 of Protocol I, and was officially constituted in 1991. The Commission is a permanent international body tasked with investigating allegations of grave breaches and other serious violations of IHL. Seventy-two States have accepted the competence of the Commission, which comprises 15 individuals elected by States. As of April 2012, the Commission is yet to be called on.
Case Study: Radovan Karadžić?

Radovan Karadžić was a Bosnian Serb political leader, who was President of Republika Srpska during the break-up of the Former Yugoslavia in the 1990s. In 1995, Karadžić held the dual positions of Supreme Commander of the Bosnian Serb armed forces and President of the National Security Council of the Republika Srpska. It was during this time that Karadžić allegedly committed a number of crimes, amounting to acts of genocide, crimes against humanity, and war crimes. As Supreme Commander of the Bosnian Serb armed forces, Karadžić allegedly ordered the so-called Siege of Sarajevo and the Srebrenica massacre, resulting in the deaths of over 8000 Bosnian Muslim men and boys. Karadžić also allegedly ordered UN personnel be taken hostage.

Karadžić was indicted by the ICTY in 1995 but evaded capture for over a decade. During his fugitive years, Karadžić worked as a psychologist and alternative medical practitioner in Belgrade under a pseudonym. Karadžić was eventually arrested in Belgrade in 2008, and transferred to the ICTY for trial. Karadžić initially refused to cooperate with the ICTY, but eventually appeared before the Tribunal, making his opening statement in March 2010. The Prosecution opened its case in April 2010 and rested in May 2012; the Defence is scheduled to open its case in October 2012. Karadžić’s case is one of the few remaining cases the ICTY is hearing, having already prosecuted over 60 cases.

Accountability Mechanisms

With regards to holding States and individuals accountable for their breaches of IHL, there are two mechanisms for this; the rules on State responsibility (for State accountability) and international criminal law (for individual accountability). The rules on State responsibility contain some provisions relevant to IHL, namely that a State is strictly responsible for all acts committed by members of its armed forces. Reprisals against protected persons and goods, as well as the civilian population, are prohibited. States may not renounce or waive the rights of protected persons, and generally speaking, claims or necessity or self-defence are not allowable as circumstances precluding the wrongfulness of any IHL violations. Under the law of State responsibility, there is a general obligation to pay compensation.

The situation with regards to individual responsibility is equally complex. Certain violations of IHL are known as war crimes. War crimes include, but are not limited to, what are known as grave breaches – those violations of the Geneva Conventions that are considered especially egregious and are considered to be of such ‘gravity and magnitude that they warrant their universal prosecution and repression.’ (Attorney General of Israel v. Eichmann [1961], 36 ILR 18, 50 (1968) (District Court of Jerusalem); affirmed in Attorney General of Israel v. Eichmann [1962], 36 ILR 277, 282-83 (1968) (Supreme Court of Israel)). Grave breaches are crimes committed against those persons and objects designated by the Conventions as specially protected. These include persons hors de combat, the wounded, sick or shipwrecked, prisoners of war, and civilians subject to the territorial control of the Detaining Power or under the belligerent occupation of an occupying power (See further Articles 50/51/130/147 of the four Geneva Conventions, respectively, and Article 85 of Additional Protocol I). Objects protected under the Conventions include medical transports and medical units, non-defended localities and demilitarised zones, and objects of cultural, historical or spiritual importance (See, for example, Article 85 of Protocol I). Such offences are perceived as attacks on the international order.

International criminal law also criminalises categories of acts known as crimes against humanity and genocide. Crimes against humanity are understood as crimes committed systematically, in accordance with an agreed plan, by either a State or organised group. The idea of crimes against humanity emerged from the criminal tribunals convened after the Second World War and have evolved to be part of customary international law. It is now generally understood that a crime against humanity can be committed during time of peace as well as in war time – a connection to armed conflict is no longer a necessary part. Additionally, genocide has been criminalised under international law, understood as acts such as killing members of a group; causing serious bodily harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and/or forcibly transferring children of the group to another group; with the intent of annihilating the group altogether. Like crimes against humanity, a connection to an armed conflict is no longer necessary for acts of genocide to be made out.

Due to the importance placed on repressing grave breaches, IHL compels parties to the Conventions to enact...
legislation to punish such breaches, to search for persons alleged to have committed such breaches, and to either bring such persons before one’s own State courts, or else extradite them to another State for prosecution. This is the principle of universal jurisdiction, which allows any State to bring to trial a person or persons accused of committing certain crimes against international law, regardless of the location of commission of the crime, or the nationality of the victim or perpetrator. By implementing a system of universal jurisdiction, the hope was that such crimes would not go unpunished, should the State ‘harbouring’ the accused be unwilling or unable to prosecute the accused. Therefore, under Articles 50/51/130/147 (Of Conventions I, II, III, and IV respectively. See also Article 85 of Protocol I), a State is obliged to punish grave breaches of the Conventions, even if the State is not a party to the Conventions, the offender(s) or victim(s) is not that State’s national, and the offence is committed outside that State’s territorial jurisdiction (GCI, Art. 49; GCII, Art. 50; GCIII, Art. 129; GCIV, Art. 146). Furthermore, if a State is unwilling to prosecute an offender within its territory, it is obliged to hand over the alleged offender to any Party to the Convention who can make out a prima facie case (GCI, Art. 49; GCII, Art. 50; GCIII, Art. 129; GCIV, Art. 146).

While the Conventions and Protocols do not provide for the concept of war crimes or grave breaches in non-international armed conflicts, customary international law has developed over the last few years to acknowledge that violations of Common Article 3 and some violations of Protocol II do indeed amount to war crimes – the Rome Statute of the International Criminal Court (ICC) includes non-international armed conflicts within its ambit, making violations of Common Article 3 of the Geneva Conventions and Protocol II a war crime. (For instance, Art. 8(2)(c)-(f), Rome Statute of the International Criminal Court, 2187 UNTS 90 (1998); see generally the UN Diplomatic Conference of Plenipotentiaries on the Establishment of a International Criminal Court, Rome, Italy, June 15-July 17 1998; UN Doc. A/CONF.183/9 (1998).

The proliferation of international criminal courts and tribunals has contributed significantly to ensuring better adherence to the laws of armed conflict. IHL is no longer seen as a law with no means of enforcement or accountability, but rather as a dynamic source of obligations for both States and individuals in their conduct in armed conflicts, both international and non-international.

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