

## **Repositioning the Institutional Mechanisms of Enforcing Laws of War for Optimal International Legal Order**

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### **Abstract**

The making of rules governing the conduct of armed conflicts has been a crucial subject of discourse in international law, and its history is traced to the emergence of modern international system. Over the years, statesmen and other key players of the international community have continued to make and adjust the norms of armed conflict, taking cognizance the changing nature of war, in terms of craft and increasing belligerents. However, issues of compliance and enforcement of laws of war constitute a major challenge to efforts at international order and global security, especially since the end of the cold war. The paper attempts a historical analysis of the making, enforcement and emergent issues in laws of war, particularly, as it relates to international legal order. It argues that effective global legal order can only be achieved when the institutions charged with the responsibility of enforcement live up to expectation.

**Keywords:** Institutions, Mechanisms, Legal Order, Laws of War, Enforcement

### **Introduction**

The importance of established norms and standards in maintaining order in the international community will never be overemphasized. As some realist scholars have argued, the international community is anarchic and power driven thereby making conflicts inevitable. Whether such conflicts occur between or among states, or within the confines of a state, international actors and agencies have put in place certain restraints aimed at minimizing or, at best, regulating the gravity of

warfare among states to ensure global orderliness. This has been the general concern of humanitarian law, which is a part of the broader International law. The discourse on laws of war therefore falls within the purveys of humanitarian law and has played significantly in the development of contemporary global politics. Laws of war are, therefore, those instrumental rules and regulations issued by international agencies in the form of treaties, customs or general principles that prescribe how wars are conducted

and approached. Although the adoption of these laws dates back to the late nineteenth century, it was the 1945 United Nations Charter that provided a legal framework for the contextualization and application of laws of war in modern international relations. The charter brought a new fillip to the understanding of laws of war, which hitherto had issues of clarification with the provisions and declarations in earlier treaties and conventions. The charter bequeaths the responsibilities of safeguarding humanitarian law on certain institutions, particularly the UN Security Council, who determines when aggressions circumvent the established norms. Henceforth, the extent to which members (and non members) of the United Nations could approach armed conflicts and the conditions for a collective use of force against aggression became more lucid.

This paper has a modest objective. It attempts an examination of the nexus of laws of war and international legal order. Specifically, it seeks to address the questions on the implementation of the laws of war and the punishments for its violations both in international and internal wars. For instance, who takes the responsibility of identifying when laws of war have been circumvented? What measures are put in place to ensure compliance of the laws of war? It, therefore, looks at how compliance and violation of the laws of war by actors in armed conflict affect international legal order. To achieve this, the paper explores the various international treaties on the laws of war and

discusses their formal provisions and mechanisms of implementation and enforcement.

### **Conceptualizing Laws of War**

It will be pertinent to begin by first understanding the concept of laws of war. Generally laws of war are frameworks of legal rules that governs the conduct of armed conflict as well as the protection of victims of war such as the wounded, shipwrecked and prisoners of war (Weigail, 2002: 133). Its purpose is to limit the suffering of war on non-combatant civilians and others directly or indirectly affected by the hostilities. It also includes standards on the use of weapons in warfare and limitations placed on states on their use of force in international relations (Solis, 2010: 34). Apparently, laws of war are part of the general international law which are considered binding on states. It deals with the inception, conduct and termination of warfare. They are based primarily upon treaties, customs as well as general principles of law recognized by 'civilized' nations (Weigail, 2002: 134). However, with the recurrent advancements in weapons, warfare and the changing natural environment, constant review of treaties relating to war have sufficed throughout the history of the modern world. One of the clearest examples of the shift from international law to world law has been the evolution of the laws of war into a body of international humanitarian law. The term 'war' remained subjective, giving states liberty to withhold the term from their military adventures.

For example, in the fight over Manchuria between Japan and China from 1937 to 1941, the Japanese refused to call the conflict a war. As a concept, the term was left with little significance after the United Nations Charter of 1945. Article 2(4) prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purpose of the United Nations." Moreover, the Geneva Conventions apply to armed conflicts, whether or not they are officially called war. In the Falkland Islands conflicts in 1982, for example, the United Nations Security Council, in Resolution 502, condemned the aggressive invasion of the Islands as a breach of the peace, even though neither Argentina nor the United Kingdom had declared war.

The Security Council of the UN is empowered by article 39 of the Charter to determine the existence of any threat to the peace, or act of aggression. It may make recommendations or declare what measures (including the use of armed forces) that could be taken in the incidence of confirmed violation of humanitarian law in armed conflict (UN, 1945). In 1972, General Assembly Resolution 334 defined and gave some examples of aggression. Article 3 provides the condition for invasion or attack by armed forces of a state, military occupation, bombardment against the territory of another state, blockade of ports of coasts, actions of states in allowing its territory to be used for preparing an act of aggression against a third state, and the sending of armed bands

against another state. Other General Assembly resolutions, notably Resolution 2625 of 1976 (the Declaration on Principles of International Law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations), stress the prohibition of the use of force contained in article 2 (4) ( UN, 1945).

Scholars have argued on the imprecise definition of force as prohibited by the Charter (See Roberts, 2000 and Kaishoven, 1987). The concepts of force (and the threat of use of force), aggression and armed conflicts appear to be used virtually interchangeably. It should be noted that article 51 mentions the right of individual as well as collective self-defense. The United States argued that the military assistance to South Vietnam in 1966 was justified as collective self-defense and also justified its air attack on military targets within Libya in 1986 by claiming that the action was taken to prevent terrorist attacks on Americans in the future. Moreover, it may be argued that a state claiming to be acting in self-defense can take into account the accumulation of hostile acts that have been committed against it in assessing, proportionately, its response. A further problem with the definition of self-defense in article 51 is the extent to which a state may intervene by military force into the territory of another state in order to rescue its nationals who are threatened there.

The Hague and Geneva Conventions are examples of agreements and covenant entered into by sovereign states on the

subject of laws of war. Treaties have been regarded as the major source of laws of war. However, laws of war are to be found not only in treaties entered into by states, but also in customary international law, which is found in the actual practices of states. Again, some aspects of the laws of war are not covered by treaty provisions, making it necessary to turn to other sources of international law such as judicial decisions like the case of the International Military Tribunals at Nuremberg and Tokyo.

The advent of industrialized warfare, and the experiences of the two world wars of the twentieth century, altered perception about both aspects of just war theory: the idea of *jus ad bellum*, or a just recourse to war, and the idea of *jus in bello*, or the just conduct of war. In the case of the former, there was a backlash against the belief that had become established during the nineteenth century that a state's right to wage war is fundamental sovereign right. In this view, sovereignty stemmed primarily from the ability of a state to establish control over a territory and its people, meaning that claims to rightful authority could result from conquest and expansion. The consequences of such thinking were evident in the European imperialism of the late nineteenth century that provided the backdrop for World War I, and in German, Italian and Japanese expansionism in the run-up to World War II. In effect, might was right. In the case of just war thinking,, rather than laying emphasis on the justification for war, the principal development has been the idea of war crimes. There is

nothing new about war crimes prosecutions. Examples of legal proceedings that stem from misconduct or abuses that occur during war can be traced back to Ancient Greece. The trial of Peter von Hagenbach in 1474 is sometimes thought of as the first war crimes trial. Hagenbach was convicted and beheaded on the authority of an *ad hoc* tribunal of the Holy Roman Empire, having been accused of carrying out warfare atrocities in Austria.

### **Evolution of International Treaties Relating to Laws of War**

According to Gaston (2012: 56), the evolution of law of war was a twentieth-century development. Prior to that time, war was perceived as the exclusive preserve of nations which they undertake either for military necessity or political purposes. Thus, war was not a subject of control and no principle existed that curtailed the right of states to embark on war. There were, however, attempts to distinguish wars that were considered 'just' from those which were 'unjust'. This was a Christian doctrine formulated by, among others, St. Augustine. It was more than likely that all states involved in a single conflict would claim to be fighting for a just cause and would show a lack of concern for the protection of those unable to defend themselves.

One of the most significant and largely controversial, developments in the laws of war is the development of the idea of "crimes against humanity". The earliest notion of a crime against humanity (even though

the term was not used) surfaced during the campaign to abolish the slave trade (Koskenniemi, 2006: 23). The 1815 Declaration on the Abolition of the Slave Trade, for instance, condemned the slave trade for offending against the principles of humanity and universal morality. The idea that such actions might be considered crimes first emerged in response to what later became known as the 'Armenian genocide', a series of massacres carried out against Armenians, Greeks and Assyrians living in the Ottoman Empire, which peaked between 1915 and 1917. The Triple Entente, an alliance of Russia, France and the UK, declared that the massacres amounted to crimes against humanity and civilization.

The development of modern weapons that could cause unnecessary suffering to combatants and the great strides made in battlefield led to the growing awareness that international cooperation was required to protect both combatants and non-combatants in hostile situations. Henri Dunant, a Swiss citizen and founder of the Red Cross, was prominent in leading a number of states to convene the Geneva Convention in 1864 to protect the wounded and sick in wars (Koskenniemi, 2006: 23). But the first attempt to codify the law of war was drafted by Francis Lieber, a college professor in New York City, United States. The Lieber code was to have a profound effect on subsequent codifications of the laws of war. In 1868, the declaration of St. Petersburg prohibited the use of explosives, while in 1879, two major treaties were concluded. The first Hague

convention was targeted exclusively on concerning the use of asphyxiating gases and another concerning the use of expanding bullets. The second Hague conference in 1907 proved to be a milestone, producing thirteen separate treaties. In 1925, the Geneva Gas protocol was signed prohibiting the use in war of asphyxiating poisons or other gases and of bacteriological methods of warfare. This was followed in 1929 by two further Geneva conventions dealing with the wounded and sick, and with prisoners of war (Koskenniemi, 2006: 23). However, the 1945 UN Charter significantly narrowed the scope of legally justified warfare. It laid down only two circumstances in which force could be legitimately used: self-defence, in which states have an unqualified sovereign right to use force if subjected to a physical attack by another state (Article 51), and when the use of force has been sanctioned by the Security Council as part of a peace enforcement action (Article 42). The Nuremberg principles extended such thinking into international criminal law by establishing the idea of 'crime against peace', allowing individuals to be prosecuted for 'planning, preparing, initiating or waging a war of aggression or conspiring to do so'. The 1945 Nuremberg Charter, nevertheless, took the matter further by drawing a formal distinction between war crimes and crimes against humanity, which has guided international jurisprudence ever since. Whereas war crimes are violations of the laws and customs of war, crimes against humanity have

the following three characteristics:

- ❖ The crimes must target civilians
- ❖ They must be widespread or systematic, and repeated.
- ❖ They must be internationally committed

Following World War II, four Geneva 1949 Conferences were convened, each dealing with: the wounded and sick on land; the wounded, sick and shipwrecked at sea; prisoners of war; and civilians. Further treaties that followed, including the 1954 Hague Convention on the protection of cultural property, the 1977 United Nations Conventions on military or any other hostile use of environment modification techniques; and the two 1977 protocols to the Geneva Conventions of 1949. Modern thinking about war crimes, nevertheless, stems from the Hague Peace Conferences of 1899 and 1907, which established a permanent court of arbitration for states in dispute wishing to use its services and also formulated series of conventions designed to limit the horrors of war. Creating the basis for the modern laws of war, the Hague Conventions prohibited, among other things, the launching of projectiles and explosives from balloons and the use of 'dum dum', or explosive, bullets, and set out rules related to the treatment of prisoners of war and the rights of neutral powers (Eyfinger, 1999: 45). The war crimes that were recognized by the Nuremberg Principles included the murder or ill-treatment of civilian populations, hostages and prisoners of war. The four Geneva Conventions adopted in

1949, with two additional protocols in 1977 and a third one in 2005, marked the widest and most detailed attempt to codify war crimes, thereby providing one of the foundations for international humanitarian law. Amongst the war crimes they identified are the following:

- i. Wilful killing
- ii. Torture or inhuman treatment, including biological experiments
- iii. Wilfully causing great suffering or serious injury to body or health
- iv. Compelling civilians or prisoners of war to serve a hostile power
- v. Wilfully depriving civilians or prisoners of war of a fair trial
- vi. The taking of hostages
- vii. Unlawful deportation, transfer of confinement
- viii. Wanton destruction and appropriation of property not justified by military necessity (Byers, 2001: 121).

As Heywood (2011:344) argued, the most detailed and ambitious attempt to codify the crimes that can be categorized as crimes against humanity is found in the 1998 Rome statute, which established the International Criminal Court. This highlights crimes, including murder, extermination, enslavement, deportation, torture, rape or sexual slavery, racial and other forms of persecution, and the crime of apartheid. The virtue of incorporating the concepts of crimes against humanity and genocide into international law is that they attempt to deal with the issue of widespread atrocities by establishing individual responsibility for actions that may not conform to the conventional

notion of a war crime. The concept of crimes against humanity in particular is underpinned by a form of moral cosmopolitanism that holds that the proper stance towards humanity is one of respect, protection and succour, humanity being morally indivisible. Critics of the concept have, nevertheless, questioned whether such a broad category of crime can ever be meaningful, and have also raised doubts about the supposedly universal moral principles on which it is based. These and other concerns about international humanitarian law have become more acute as a result of steps to anchor individual responsibility for war crimes, crimes against humanity and genocide through the establishment of international criminal tribunals and International Criminal Court.

### **Institutional Mechanisms of Enforcement**

#### ***The UN Security Council and General Assembly***

The roles played by the United Nations in the enforcement of the laws of war have taken several forms. These include the role played by the General Assembly and Security Council resolutions; diverse monitoring and investigative missions of the Secretary-General in armed conflict situations; authorization of use of force to repress violations; the establishment of international tribunals in former Yugoslavia and Rwanda to try war crime cases and the establishment of International Criminal Court. In the

first instance, Article VII of the 1949 Genocide Convention, which made significant reference to the United Nations, was negotiated at the UN General Assembly. Another major landmark in UN involvement in implementation was the General Assembly Resolution 2444 of December 19, 1968 on Respect for Human Rights in Armed Conflicts. Literally, a good number of UN General Assembly resolutions have used the laws of war as a basis for criticizing the actions of particular states. For instance, Israel's conduct in the occupied territories has been condemned with particular frequency (Iriiye, 2006:236).

Since the 1980s, the UN Security Council has made unprecedented efforts in enforcement of the laws of war. It has addressed two fundamental distinct aspects; first, the investigation and punishment of major violations by belligerents, and second, the management of UN authorized forces, whether in peacekeeping or enforcement actions, in a manner consistent with the laws of war. In the conflict over Kuwait (1990-91), for instance, the Security Council passed many resolutions ranging from the one on ceasefire, reparations and dismantling of Iraq's capacity for chemical warfare (Iriiye, 2006: 241).

#### ***International Tribunals***

After the Nuremberg and Tokyo trials, the superpowers' disagreement precluded the use of international criminal tribunals for the rest of the Cold War, which were to take place at the corresponding national courts. The end of the Cold War and the

breaking of logjam in the UN Security Council created circumstances in which international tribunals could, once again, be established. Reports of massacres and ethnic cleansing in the former Yugoslavia led, in 1993, to the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) located in the Hague, the Netherlands, the first genuinely international tribunal convened since Nuremberg and Tokyo. The ICTY was also the first tribunal to invoke the Genocide Convention. The tribunal was mandated to prosecute crimes against humanity, violation of the laws of war, and genocide committed in the various Yugoslav wars. The most important figure indicted by the ICTY was Slobodan Milosevic, the former head of state of the Federal Republic of Yugoslavia. Milosevic was the first head of state to be prosecuted under international humanitarian law. He was arrested in 2001 and his trial on 66 counts of genocide, crime against humanity and war crimes, but unfortunately he died in the course of the trial. By May 2010, 135 people had been tried and convicted by the ICTY (Byers, 2001: 121).

The UN authorized a second international tribunal following the 1994 genocide in Rwanda, which had led to the death of about 800,000 Rwandans. The new tribunal, the International Criminal Tribunal for Rwanda (ICTR) was located in Arusha, Tanzania and held its first trial in 1997 (Heywood, 2011: 344). By May 2010, 50 trials had been completed, leading to the conviction of 34 people, with 8 cases on appeal.

In the most significant of these trials, Jean Kambanda, the former prime minister of Rwanda, became the first and so far the only head of state to plead guilty to genocide, when he was convicted in 1998 and sentenced to life imprisonment (Heywood, 2011: 345). In 2002, the Special Court for Sierra Leone was set up jointly by the UN and the government of Sierra Leone to consider serious violations of international humanitarian law that had occurred during Sierra Leone's ten-year civil war. This involved the indictment in 2003 of the former president of Liberia, Charles Taylor, for his alleged role in supporting rebel forces that used amputations and rape to gain control of Sierra Leone's diamond mines. After living in exile in Nigeria, Taylor was arrested once he crossed the border into Cameroun and transferred to a specially convened tribunal of the ICTR in the Hague, where his war crimes trial started in 2006. (Heywood, 2011: 344).

These various tribunals and courts, especially those set up to examine atrocities committed in former Yugoslavia and Rwanda, influenced the development of international criminal law in a number of important ways. In the first place, they re-focused attention on large-scale human rights violations, particularly through high-profile trials of senior political figures. Apart from anything else, this strengthened the idea that establishing personal culpability for war crimes, crimes against humanity or genocide may reduce the incidence of mass atrocities. Second, whereas previous war crimes trials



had been concerned with acts that took place in the context of inter-state war, the ICTY and the ICTR recognized that crimes against humanity may take place during an internal armed conflict or even during periods of peace (Heywood, 2011:344).

#### ***International Criminal Court (ICC)***

In place of the foregoing *ad hoc* arrangement of criminal trials, delegates from 160 countries, 33 international organizations and a coalition of NGOs met in Rome in 1998 to draft the statute of the International Criminal Court (ICC) (Solis, 2010). The Rome statute established the ICC as a court of last resort exercising jurisdiction only when national courts are unwilling or unable to investigate or prosecute acts of genocide, crimes against humanity, war crimes and potential aggression. The ICC has succeeded in bringing in the much needed coherence to the process of enforcement and has also kept the Security Council and the International Court of Justice from interfering in matters of war crimes, crime against humanity and genocide. It has taken up the global justice gap on laws of war, particularly when states' internal remedies to armed conflicts are unavailable (Solis, 2010).

Most importantly, the ICC, since its inception, has contributed in deterring potential aggressors and in shaping the behavior of political and military leaders. The fear of possible legal proceedings by the ICC has remained prevalent, especially among 'dictatorial' regimes across

the world. However, the ICC has been criticized as a political tool of the West in perpetuating subjugation of the Third World countries and perceived "rogue states".

#### ***The International Court of Justice***

Though the International Court of Justice (ICJ) statute has many limitations on the types of cases that may be brought before it and by whom, the court has played significant roles in the implementation of laws of war. For instance, in the case between Bosnia-Herzegovinian and the Federal Republic of Yugoslavia, the court played a crucial role by clarifying the provisions of the laws of war and their application to particular circumstances. It again published fundamental principles which should inform the policy making of states in matters relating to the use of force. Nevertheless, ICJ's lack of capacity to try individuals for violations of laws of war is one of the considerations that resulted in the establishment of the International Criminal Court.

#### ***Other Mechanisms of Compliance***

Criminal trials have often been regarded as the major means of securing implementation of laws of war. However, there are other means that are provided for in the 1949 convention. Two of such other ways of securing enforcement will be discussed here.

##### ***i. Formation of Military Coalition Against an Offending State***

Most times, illegal conducts by belligerents, including the commission of atrocities, have resulted in the formation of

international military coalition for the use of force against the offending states. Examples include the anti-Axis alliance in the Second World War, the international coalition against Iraq in 1990-91, the Multination Intervention in Somalia in December, 1992, and the decision by NATO and UN to initiate *Operation Deliberate Force* in Bosnia-Herzegovina in 1995 (Shaw, 2008: 36).

### **ii. Threat of Reprisal**

Most often, the threat or actuality of reprisals have been important means of securing implementation of the laws of war. There are evidences that suggest that fear of reprisals had played some part in the non-use of chemical weapons by the various belligerents in the Second World War and by Iraq in the 1991 Gulf War (Gaston, 2012). Thus, the threat of reprisals is implicit in the reservations made by states when they originally acceded to the 1925 Geneva Protocol prohibiting the use of gas and bacteriological products in war. The same is applicable in the adherence of states such as Israel and Iran to the provisions of Nuclear Non-Proliferation Treaty of 1969.

### **Conclusion**

The varied aspects of the concerns on the conduct and justification of armed conflicts, without doubt, are adequately provided for by the several international treaties dealing with laws of war. What is of paramount concern to the international community is the application of these provisions to contemporary conflicts and how to

ensure compliance by states. One of the key issues in contemporary international relations is the question of how to adequately respond to violation of the laws of war. Many have, unsurprisingly, looked up to the various international institutions, particularly the United Nations, to answer this lingering question of enforcement. It is apparent from the foregoing that the formal mechanisms of implementation, which were provided for by the various treaties, undoubtedly, have not lived up to expectation. The United Nations has, therefore, taken up the role of implementation. Nevertheless, states have remained crucial in the efforts at implementation and enforcement. It is pertinent to state that through the varied forms of punishments for violations of the laws of war, such as the trials of war crimes and crimes against humanity, there had been an effective deterrence to would-be aggressors and, directly or indirectly, have positioned the world to an effective legal order.

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