The Relationship between International Humanitarian Law & International Criminal Tribunals

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Abstract

International humanitarian law is the branch of customary and treaty-based international positive law whose purposes are to limit the methods and means of warfare and to protect the victims of armed conflicts. Grave breaches of its rules constitute war crimes for which individuals may be held directly accountable and which it is up to sovereign states to prosecute. However, should a state not wish to, or not be in a position to, prosecute, the crimes can be tried by international criminal tribunals instituted by treaty or by binding decision of the United Nations Security Council. This brief description of the current legal and political situation reflects the state of the law at the dawn of the twenty-first century. It does not, however, describe the work of a single day or the fruit of a single endeavour. Quite the contrary, it is the outcome of the international community's growing awareness, in the face of the horrors of war and the indescribable suffering inflicted on humanity throughout the ages, that there must be limits to violence and that those limits must be established by the law and those responsible punished so as to discourage future perpetrators from exceeding them.

Keywords: War crimes, International humanitarian law, International criminal tribunals, victims, Grave breaches

SHORT HISTORICAL OVERVIEW

International humanitarian law has played a decisive role in this development, as both the laws and customs of war and the rules for the protection of victims fall within its material scope. Indeed, an initial proposal to reach agreement on the establishment of an international criminal court was formulated in the nineteenth century with a view to prosecuting violations of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, which was adopted in 1864.

In 1907 the states codified the laws and customs of war applicable to war on land in the Hague Convention No. IV and its annexed Regulations. The Convention provides that the obligations set down in its rules are binding on the states parties, but at the end of the First World War the peace treaty signed at Versailles in 19191 established that Kaiser William II of Germany, whom it publicly arraigned for a supreme offence against international morality and the sanctity of treaties, and those who had carried out his orders were personally responsible. It thus recognized the right of the Allied and associate governments to establish military tribunals for the purpose of prosecuting persons accused of having committed war crimes.

The responsibility, not only of the states but fundamentally of individuals, was thus established as a principle of international law, allowing grave breaches of international humanitarian law to be prosecuted by international tribunals established for that purpose

The adoption of the Charters of the Nuremberg and Tokyo Tribunals gave significant impetus to the codification of international humanitarian law: for the first time treaty-based

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rules defined a series of criminal offences for which individuals could be held accountable, and at the same time courts were instituted that took effective action and set out a series of universally recognized principles. It must be borne in mind, however, that at that point in the development of the law, for conduct to be considered unlawful it had to be connected with war, that is, with an armed struggle between two or more states.

The final step was the establishment by treaty of the International Criminal Court, a permanent body whose role is to prosecute what the international community as a whole considers to be the most serious misconduct, including, of course, war crimes. Thus the institution of international criminal courts authorized to prosecute individuals for their conduct when states do not want or are not in a position to do so is related to and directly influenced by the content of international humanitarian law and the definition as war crimes of grave breaches thereof. In the following pages we shall try, albeit briefly, to trace the emergence of this interrelationship step by step, in order to outline its present scope.

THE PRESENT

The development of international humanitarian law has been accompanied by the formulation of principles and the adoption of multilateral treaties intended to be universal and applicable to war crimes. The rules set down in the statutes of international criminal courts and the work the courts have done and are doing within the scope of their respective mandates reflect that development and at the same time highlight the direct relationship between the object and purpose of international humanitarian law and the establishment of the tribunals. Their jurisprudence, although not an independent law-making process, is a particularly useful additional means of determining the existence of a rule of law, its meaning and its scope.

No retroactivity

The principle "nullum crimen sine lege" is one of the fundamental principles of criminal law; it holds that no one may be held accountable for an unlawful act unless it has been established that at the time the act was committed it was subject to clear rules making it a crime ante factum. This principle, which is applicable in domestic legal orders, is also relevant in international law. Ultimately, individuals incur international responsibility for their conduct if the said conduct is unlawful under international law, no matter what the provisions of domestic law are

INDIVIDUAL CRIMINAL RESPONSIBILITY

The Nuremberg Tribunal thus emphasized the relationship between the treaty based and customary rules of international humanitarian law prohibiting certain forms of individual conduct and its institution as a court with a mandate to apply that positive legal order.

Criminal responsibility, on the other hand, falls on natural persons who commit an act specifically defined as a crime by the international law. This is the field of international law that refers to the individual as such and that can therefore be assimilated to the rules of international human rights law, given that the direct object of both branches of the law – although their content and purpose are different – is the human being. Furthermore, individual criminal responsibility is incurred not only by acting, but also by intentionally or imprudently ignoring a rule that stipulates a clear obligation to act in a certain way, that is, by failure to act.

Command responsibility

The first postulate – the responsibility of military leaders – originates from the law of war and was codified in the Hague Convention No. IV of 1907 and its Regulations respecting the laws and customs of war on land.

This aspect of individual criminal responsibility – command responsibility – is linked to the responsibility of the subordinate who commits the crime.

WAR CRIMES IN ALL SITUATIONS OF ARMED CONFLICTS

While individual criminal responsibility for the commission of war crimes is a principle of general international law set down in the Versailles Peace Treaty and in the Charter of the Nuremberg Tribunal, it must not be forgotten that the crimes referred to in the former and tried by the latter were violations of the laws and customs of war committed specifically during a war. The 1949 Geneva Conventions and their Additional Protocols extend the scope of application to any international armed conflict but contain no provisions on whether such crimes can also be perpetrated in non-international armed conflicts. In this respect, the case-law of the ICTY and the ICTR is especially valuable for determining the scope of international humanitarian law, since these were the first international courts called on to prosecute such crimes.

AN EXPANDED NOTION OF WAR CRIMES?

Consequently, since the material jurisdiction attributed to the ICTY by the Security Council concerns rules that, at the time of its establishment, formed part of both international customary and treaty-based law, the ICTY's decisions will tell us whether in the years since the institution of the Nuremberg Tribunal the notion of war crime has been expanded. In fact, that notion applies not only to grave breaches of international humanitarian law committed in the context of a war as such, but also to acts perpetrated in connection with an armed conflict, be it international or not.

From the Statutes of the ICTY and the ICTR and from their jurisprudence interpreting international humanitarian law, it emerges that violations of the prohibitions contained in common Article 3 constitute war crimes in any situation of armed conflict. It must be borne in mind, however, that the ICTY Statute has two distinct rules, one granting it jurisdiction to prosecute violations of the laws and customs of war, the other to try grave breaches of the 1949 Geneva Conventions. In connection with the latter, the Tribunal has the power to prosecute any of the acts listed and committed against persons or objects protected by the provisions of the Conventions.

The question of control

In this respect the ICTY stated that for this provision of its Statute to apply – as opposed to the provision referring to violations of the laws and customs of war – the conflict would have to be international.

The connection to the armed conflict

War crimes are therefore serious violations of an international treaty-based or customary rule that enshrines basic values, entails serious consequences for the victim and incurs the perpetrator's responsibility. Such crimes must be perpetrated in direct connection with the armed conflict, be it international or not international in character. The application of the rules of international humanitarian law does not depend on the will of the parties involved but rather on the objective fact of the existence of an armed conflict.

THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

Many of the principles of international humanitarian law highlighted in the jurisprudence of the ICTY and the ICTR, interpreting the rules contained in their Statutes in the light of developments in that branch of positive law, and many provisions of the multilateral

treaties adopted with a view to limiting violence were taken into account when the conference convened in Rome in 1998 under the auspices of the United Nations adopted the Statute of the International Criminal Court (Rome Statute). The Court was given the power to exercise its jurisdiction over persons whose conduct was a crime under the Court's jurisdiction at the time it occurred; the official capacity of a person does not exempt that person from responsibility; and, while the Rome Statute establishes the responsibility of commanders and other superiors, it also provides that, in principle, the fact that the crime was committed pursuant to an order of a government or of a superior does not relieve the person concerned of responsibility.

The Court has jurisdiction inter alia over war crimes. While the Rome Statute, it is true, has the most extensive list of war crimes, it deals with them somewhat differently because a state, on becoming party to the Statute, may declare that, for a period of seven years after the Statute comes into force for it, it does not accept the jurisdiction of the Court with respect to war crimes when a crime is alleged to have been committed by its nationals or on its territory. Moreover, it is only in respect of war crimes that the accused can claim to be exempt from responsibility because of an order given by a government or a superior if he was under a legal obligation to obey the order, he did not know the order was unlawful and the order was not manifestly unlawful. And it is only in connection with war crimes that self-defence can be invoked not for the person but for an object essential to that person's survival or to the accomplishment of a military mission.

The Rome Statute, reflecting developments in customary law highlighted by the Statutes and jurisprudence of the ICTY and the ICTR, defines four categories of war crimes, two in respect of international armed conflicts and two in respect of conflicts not international in character. However, the Elements of Crimes adopted by the Assembly of States Parties to assist in the interpretation and application of the Court's jurisdiction specify that there is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international, nor is there a requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international; there is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict because a war crime must occur in the context of such a conflict and be associated with it.

The first category of crimes defined in respect of situations of international armed conflict is grave breaches of the 1949 Geneva Conventions. The second category of crimes concerns other serious violations of the laws and customs applicable in international armed conflicts, ''within the established framework of international law''. The crimes identified are related to the Law of The Hague and are considered to be war crimes under Protocol I additional to the Geneva Conventions.

The Rome Statute also defines two categories of war crimes committed in armed conflicts that are not international in character. The first is made up of serious violations of common Article 3, it being specified that the relevant article of the Rome Statute does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. The second refers to other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.

Lastly, the Rome Statute includes as war crimes in situations of armed conflict that are not international in character some of the prohibitions as to methods of combat set down in the Regulations annexed to the Hague Convention No. IV of 1907, such as killing or wounding treacherously a combatant adversary, declaring that no quarter will be given or destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict, and intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

CONCLUSIONS

Grave breaches of international humanitarian law constitute war crimes that incur the individual criminal responsibility of those who commit them by their action or failure to act.

Of course, this system of legal rules is applicable in situations of international armed conflict, that is, when recourse is had to armed force between states. But it can also apply in a conflict that breaks out on the territory of a state when a third state sends in its troops or one of the parties acts in the interests of another state that has overall control over it.

Situations of internal unrest and strife, on the other hand, are not covered by this system, for it is the responsibility of the state to maintain or restore order and defend its territorial unity. However, if protracted armed violence takes place between governmental authorities and organized armed groups or between such groups on the territory of a state, the parties involved have the rights and duties established by international humanitarian law and, ultimately, their engagement in prohibited conduct is also a war crime.

Responsibility for prosecuting the perpetrators falls first and foremost to the states, but if they do not wish or are not in a position to do so, practice has led to the establishment of international criminal tribunals so that those engaging in prohibited conduct do not go unpunished, no matter what the context in which the conduct took place. Punishing those responsible obviously constitutes effective application of the law, giving full effect to rules that are of interest to the entire community. It may thus be possible in the future to provide the victims with better protection, it being utopian to think that human beings will decide to eradicate violence once and for all.

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