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**IMPLEMENTATION AND ENFORCEMENT OF IHL AND REPRESSION OF WAR CRIMES.**

# LIST OF STATUTES

Rome Statute of the International Criminal Court, 1998

# LIST OF ABBREVIATIONS

IHL International Humanitarian Law

ICRC International Committee of the Red Cross

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# INTRODUCTION

The purpose of International Humanitarian Law is to safeguard the victims of armed conflicts and regulate aggressions based on a balance between military necessity and humanity. IHL encompasses rules of international law which establish minimum standards of humanity that must be respected in any situation of armed conflict and holds individuals responsible for violations of humanitarian law which they commit, or order others to commit and requires that those responsible for serious violations should be prosecuted and punished as criminals. The most serious violations of humanitarian law are termed war crimes[[1]](#footnote-1).

# IMPLEMENTATION AND ENFORCEMENT OF IHL

Implementing and enforcing IHL is challenging owing to the notion of equality of states and sovereignty. Moreover, enforcement is decentralized and voluntary since but there are certain measures in place to ensure compliance with IHL obligations; for example, these can take the form of penal and disciplinary measures, legal advisors in the military and military sanctions, fact-finding missions, human rights bodies, and the enforcement of international criminal law through courts and tribunals.

The law in itself is implemented through the dependence on military operations to successfully respect the systems of war. This would assume that the combatants understand what is entailed in the laws. Another factor for consideration is the existence of structures that are capable in implementing IHL and for a long time institutions that have been helping afflicted parties in times of war have been the Red Cross and the Red Crescent. Additionally in the implementation of IHL the establishment of adjudication mechanisms to administer justice play an important role.

## MEASURES IN TIMES OF PEACE

States have the duty to ensure they take positive steps to implement IHL. Such measures include the domestication of IHL treaties through national legislation, to ensure their domestic implementation[[2]](#footnote-2) with other measures being instructing soldiers on IHL through military manuals to guide them on their mandate, regularly training members of armed force, making IHL rules as part of the rules of engagement and dissemination of IHL through civic education.[[3]](#footnote-3)

## MEASURES IN TIMES OF WAR

Under article 1 of the Geneva Conventions, states and parties have a duty to ensure respect for the provisions of the convention during the war.

### PROTECTING POWERS

Sometimes, neutral states exercise protecting powers to ensure compliance with IHL principles in situations of armed conflict. These powers are exercised in several ways such as visits to persons in detention, supervising relief missions and evacuations and assisting in judicial proceedings against protected persons[[4]](#footnote-4). During armed conflict, one of the institutions that serves as a neutral, independent body, working with all parties to the conflict in assisting all victims of armed conflict is the ICRC whose tasks include; visiting persons in detention, conducting interviews on the conditions of detentions, approaching states that breach detention conditions set out in the conventions, in order to help improve the conditions, providing relief supplies and medical help to victims of armed conflict[[5]](#footnote-5). In international armed conflicts, the ICRC has a guaranteed right to provide humanitarian assistance to States; under Article 81 of Protocol I which provides that states are indulged to accept the assistance of the ICRC. While, the ICRC has no such guaranteed right in non-international armed conflicts it may only offer such services, with States under no obligation to accept the offer

### ACCOUNTABILITY MECHANISMS

Criminal sanctions have helped in the enforcement of IHL through apportionment of criminal liability on persons who breach IHL principles.

IHL provides for sanctions and measures whereby Sanctions take a variety of forms as they can be criminal or disciplinary, judicial or not, handed down by a criminal court under ordinary or military law, or by an international or national tribunal[[6]](#footnote-6). Sanctions have a number of consistent characteristics in that there must be no difference in the sanction based on the nature of the armed conflict, the sanction must apply to all without distinction and sanctions play their role if they assisted to mark the unacceptable nature of the offence in every case[[7]](#footnote-7).

The measures taken may include military regulations, administrative orders and other regulatory measures. However criminal legislation is the most appropriate and effective means of dealing with all serious violations of international humanitarian law. A number of States have already enacted criminal law to punish violations of the provisions of Common Article 3 of the Geneva Conventions and Additional Protocol II which apply to non-international armed conflict[[8]](#footnote-8).

States and individuals are also held accountable for breaching IHL. Under state responsibility or accountability[[9]](#footnote-9); a state is held accountable for all acts performed 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 a general obligation to pay compensation.

Under individual responsibility, some IHL violations are war crimes and owing to the gravity of such violations; they warrant universal prosecution as affirmed in Attorney General of Israel v. Eichmann whereby Adolf Eichmann, head of the Jewish office of the Gestapo during World War II, was convicted of war crimes, crimes against the Jewish people, and crimes against humanity. Although the crimes were not committed on the territory of Israel which at the time did not exist as a state, the court held that such acts could be tried by any state that had custody of the defendant. This universal jurisdiction principle has helped to ensure that war crimes do not go unpunished[[10]](#footnote-10).

### REPARATIONS

Should parties to a conflict be held responsible for breaches in IHL in international armed conflict, there is an obligation to pay compensation.[[11]](#footnote-11) It remains disputed, however, whether an individual right to reparations is recognized under IHL.

### FACT-FINDING

Fact-finding can be defined as a method of determining facts through the evaluation and compilation of various information sources[[12]](#footnote-12) While fact-finding missions, such as those conducted or supported by the UN Office of the High Commissioner for Human Rights and the UN Human Rights Council (UNHRC) have focused on human rights violations in peacetime and during armed conflict, they have more recently expanded to include coverage of IHL, for example, the UNHRC sponsored fact-finding on the Gaza conflict of 2008-2009, on the Israeli attacks on the flotilla of ships carrying humanitarian assistance of 2010 with other fact finding missions being the Kalshoven Commission in Yugoslavia of 1992 and the International Inquiry on Darfur of 1995 both of which were authorised by the UN Security Council.

Fact-finding has also extended to cover non-state actors, such as the Darfur rebels and the Palestinian authorities.[[13]](#footnote-13) There have also been fact-finding visits of the UN special rapporteur on violence against women to various conflict areas, such as Darfur, the DRC and Palestine.

By ascertaining facts and interpreting and applying general IHL rules, fact-finding can play an integral role in the implementation of IHL. Fact-finding can also facilitate determinations of individual criminal liability like those in Yugoslavia and Darfur.

#### THE INTERNATIONAL FACT-FINDING COMMISSION

This Commission was created pursuant to Article 90 of Protocol I, to ensure respect for IHL. The Commission is a permanent international body tasked with investigating allegations of grave breaches and other serious violations of IHL[[14]](#footnote-14). However, it has rarely been relied upon in large part due to the requirement that inquiries can only be initiated by state parties into other state parties, rather than individuals claiming breaches of IHL.

TRIAL BY INTERNATIONAL OR MIXED TRIBUNALS[[15]](#footnote-15)

States may discharge their obligation to investigate war crimes and prosecute the suspects by setting up international or mixed tribunals to that effect, a fact commented upon in military manuals, national case-law and official statements.

This is demonstrated by the creation of the International Military Tribunals at Nuremberg and at Tokyo after the Second World War and, more recently, by the establishment by the UN Security Council of the International Criminal Tribunals for the former Yugoslavia and for Rwanda. The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea were established pursuant to an agreement between the United Nations and Sierra Leone and Cambodia respectively[[16]](#footnote-16).

# REPRESSION OF WAR CRIMES.

The term repression generally refers to the adoption of legislation necessary to prevent and punish violations of the law[[17]](#footnote-17).

War crimes as a generic concept is serious violations of the laws or customs of international or internal armed conflicts, committed in the course of an armed conflict in circumstances that require criminal punishment of the culprit[[18]](#footnote-18). Under the Rome statute of the International Criminal Court of 1998 war crimes are described as grave breaches of the Geneva Conventions of 12 August 1949 as any act against persons or property protected under the provisions of the relevant Geneva Convention.

Article 8 of the Rome statute[[19]](#footnote-19) provides for the aforementioned acts that amount to war crimes as being the Willful killing, torture or inhuman treatment, including biological experiments, Willfully causing great suffering, or serious injury to body or health, extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or other protected person to serve in the forces of a hostile Power willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement and taking of hostages[[20]](#footnote-20) among others.

The Conventions and Protocol make clear that grave breaches must be punished. However they do not themselves set out specific penalties nor do they create a tribunal to try offenders. IHL requires States to enact legislation to punish such grave breaches, to search for persons who have allegedly committed such crimes, and to bring them before their own courts or to extradite them to another State for prosecution[[21]](#footnote-21). IHL moreover contains provisions on the legal qualification of an individual’s failure to act and on group criminality, such as the responsibility of commanders.

IHL confers universal jurisdiction over grave breaches on all States. Moreover, it requires all States to prosecute war criminals, regardless of their nationality, the nationality of the victim, and where the crime was committed[[22]](#footnote-22). For this reason, States are required to enact criminal legislation to punish those responsible for grave breaches. It requires States to search for and punish all those who have committed grave breaches regardless of the nationality of the perpetrator or where the crime was committed[[23]](#footnote-23). This universal jurisdiction principle as earlier mentioned, is a key element in ensuring the effective repression of grave breaches

Various countries states have steps in repressing war crimes by ensuring national legislation is in place; for example Germany has the Code of Crimes Against International Law (CCAIL) whose scope of application stretches to conduct which was committed abroad and bears no relation to Germany as long as it is a war crime[[24]](#footnote-24); the United states war crimes act is another national legislation that provides for how violations against war crimes will be handled with the scope of application being of acts carried out inside or outside the United States with shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death[[25]](#footnote-25).

In Switzerland the legislation providing for repression of war crimes is the Swiss Criminal Code of 21 December 1937 and provides for penalties of custodial sentences of not less than five years for any person who commits a serious violation of the Geneva Conventions of 12 August 19491 and for other crimes of being in connection to war crimes or enlisting children under 15 years into armed forces a custodial sentence of not less than three years[[26]](#footnote-26) A military tribunal in Switzerland oversaw a case where an individual was brought in with the charges of breaching the Geneva Convention relative to the Treatment of Prisoners of War, breaching the Geneva Convention relative to the Protection of Civilian Persons in Time of War, breaching the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Articles 4, 5 and 13), breach of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International [sic] Armed Conflicts (Protocol I) (Articles 10, 11, 75, 76, 77 and 85) and ruled that the individual was acquitted due to the lack of evidence and granted compensation for prolonged imprisonment[[27]](#footnote-27).

REFUGEE STATUS

It is generally accepted that persons suspected of having committed war crimes are not entitled to refugee status. This is provided for, in particular, in the Convention on the Status of Refugees, and there is State practice to this effect. In 1994, with respect to Rwanda, the UN Security Council noted that persons involved in serious breaches of international humanitarian law cannot achieve immunity from prosecution by fleeing the country and that the provisions of the Convention relating to the status of refugees do not apply to such persons[[28]](#footnote-28).

Exclusion from asylum of suspected war criminals has also been supported by the UN General Assembly in the Declaration on Territorial Asylum and in Resolution 3074 (XXVIII) on principles of international cooperation in the detection, arrest, extradition and punishment of war criminals[[29]](#footnote-29).

# CONCLUSION

Compliance with IHL has been promoted in various ways, ranging from dissemination and training members of armed forces and groups, proceedings against individual perpetrators or parties to an armed conflict before domestic and international courts, targeted sanctions and engaging with the violating party to assist it to remedy its wrongdoing. However the framework of implementation and enforcement needs strengthening in order to establish accountability for violations of IHL by having dedicated judicial or quasi-judicial bodies in place to consider claims of violations of international humanitarian law and to provide guidance on the interpretation of that law. This will mitigate the risks brought about by the voluntary nature of punishing war crimes that is provided to states.

# BIBLIOGRAPHY

**‘Criminal Repression of Serious IHL Violations: Information Kit’ <https://www.icrc.org/en/document/criminal-repression-serious-ihl-violations-information-kit?amp> accessed 6 May 2020**

**‘Customary IHL - Rule 158. Prosecution of War Crimes’ <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\_cha\_chapter44\_rule158> accessed 4 May 2020**

**‘Germany, International Criminal Code | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/case-study/germany-international-criminal-code> accessed 6 May 2020**

**‘GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.Pdf’ <https://www.icc-cpi.int/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf> accessed 4 May 2020**

**Hill-Cawthorne L, ‘Rights under International Humanitarian Law’ (2017) 28 European Journal of International Law 1187**

**Islam MS, ‘Domestic Measures during Peace Time for the Implementation of International Humanitarian Law (IHL)’ (2017) 14 IIUC Studies 111**

**Kussbach E, ‘The International Humanitarian Fact-Finding Commission’ (1994) 43 International & Comparative Law Quarterly 174**

**‘Penal\_Repression’ 3 <https://www.icrc.org/en/doc/assets/files/other/penal\_repression.pdf> accessed 4 May 2020**

**Pfanner T, ‘Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims’ (2009) 91 International Review of the Red Cross 279**

**‘Preventing and Repressing International Crimes.Pdf’ <https://www.cervenykriz.eu/cz/nsmhp/setkaniNKMHP.pdf> accessed 4 May 2020**

**Ratner SR, ‘Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War’ (2011) 22 The European Journal of International Law 459**

**‘Repression of Breaches | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/glossary/repression-breaches> accessed 5 May 2020**

**‘Rome Statute of the International Criminal Court, 1998’ <https://legal.un.org/icc/statute/99\_corr/cstatute.htm> accessed 4 May 2020**

**Secretariat C, ‘Promotion and Implementation of International Humanitarian Law: A Commonwealth Perspective’ (2017) 43 Commonwealth Law Bulletin 504**

**‘Switzerland, Criminal Code | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/case-study/switzerland-criminal-code#art\_108> accessed 6 May 2020**

**‘Switzerland, Military Tribunal of Division 1, Acquittal of G. | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/case-study/switzerland-military-tribunal-division-1-acquittal-g> accessed 6 May 2020**

**‘United States, War Crimes Act | How Does Law Protect in War? - Online Casebook’ <https://casebook.icrc.org/case-study/united-states-war-crimes-act> accessed 6 May 2020**

**Attorney General of Israel v Eichmann [1962], 36 ILR 277, 282-83 (1968)**

1. ‘Penal\_Repression’ 3 <<https://www.icrc.org/en/doc/assets/files/other/penal_repression.pdf>> accessed 4 May 2020. [↑](#footnote-ref-1)
2. Mohammad Saidul Islam, ‘Domestic Measures during Peace Time for the Implementation of International Humanitarian Law (IHL)’ (2017) 14 IIUC Studies 111. [↑](#footnote-ref-2)
3. Commonwealth Secretariat, ‘Promotion and Implementation of International Humanitarian Law: A Commonwealth Perspective’ (2017) 43 Commonwealth Law Bulletin 504. [↑](#footnote-ref-3)
4. Lawrence Hill-Cawthorne, ‘Rights under International Humanitarian Law’ (2017) 28 European Journal of International Law 1187. [↑](#footnote-ref-4)
5. Steven R Ratner, ‘Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War’ (2011) 22 The European Journal of International Law 459. [↑](#footnote-ref-5)
6. ‘Preventing and Repressing International Crimes.Pdf’ <<https://www.cervenykriz.eu/cz/nsmhp/setkaniNKMHP.pdf>> accessed 4 May 2020. [↑](#footnote-ref-6)
7. ibid. [↑](#footnote-ref-7)
8. ‘Criminal Repression of Serious IHL Violations: Information Kit’ <<https://www.icrc.org/en/document/criminal-repression-serious-ihl-violations-information-kit?amp>> accessed 6 May 2020. [↑](#footnote-ref-8)
9. Toni Pfanner, ‘Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims’ (2009) 91 International Review of the Red Cross 279. [↑](#footnote-ref-9)
10. Attorney General of Israel v Eichmann [1962], 36 ILR 277, 282-83 (1968). [↑](#footnote-ref-10)
11. Additional Protocol 1, Art 91 [↑](#footnote-ref-11)
12. Boutruche, 2011, p. 2 [↑](#footnote-ref-12)
13. Yihdego, 2012. [↑](#footnote-ref-13)
14. Erich Kussbach, ‘The International Humanitarian Fact-Finding Commission’ (1994) 43 International & Comparative Law Quarterly 174. [↑](#footnote-ref-14)
15. ‘Customary IHL - Rule 158. Prosecution of War Crimes’ <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule158>> accessed 4 May 2020. [↑](#footnote-ref-15)
16. ibid. [↑](#footnote-ref-16)
17. ‘Repression of Breaches | How Does Law Protect in War? - Online Casebook’ <<https://casebook.icrc.org/glossary/repression-breaches>> accessed 5 May 2020. [↑](#footnote-ref-17)
18. ‘GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.Pdf’ <<https://www.icc-cpi.int/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf>> accessed 4 May 2020. [↑](#footnote-ref-18)
19. ‘Rome Statute of the International Criminal Court, 1998’ <<https://legal.un.org/icc/statute/99_corr/cstatute.htm>> accessed 4 May 2020. [↑](#footnote-ref-19)
20. ibid. [↑](#footnote-ref-20)
21. ‘Criminal Repression of Serious IHL Violations: Information Kit’ (n 12). [↑](#footnote-ref-21)
22. ibid. [↑](#footnote-ref-22)
23. ibid. [↑](#footnote-ref-23)
24. ‘Germany, International Criminal Code | How Does Law Protect in War? - Online Casebook’ <<https://casebook.icrc.org/case-study/germany-international-criminal-code>> accessed 6 May 2020. [↑](#footnote-ref-24)
25. ‘United States, War Crimes Act | How Does Law Protect in War? - Online Casebook’ <<https://casebook.icrc.org/case-study/united-states-war-crimes-act>> accessed 6 May 2020. [↑](#footnote-ref-25)
26. ‘Switzerland, Criminal Code | How Does Law Protect in War? - Online Casebook’ <[https://casebook.icrc.org/case-study/switzerland-criminal-code#art\_108](https://casebook.icrc.org/case-study/switzerland-criminal-code%23art_108)> accessed 6 May 2020. [↑](#footnote-ref-26)
27. ‘Switzerland, Military Tribunal of Division 1, Acquittal of G. | How Does Law Protect in War? - Online Casebook’ <<https://casebook.icrc.org/case-study/switzerland-military-tribunal-division-1-acquittal-g>> accessed 6 May 2020. [↑](#footnote-ref-27)
28. ‘Customary IHL - Rule 158. Prosecution of War Crimes’ (n 15). [↑](#footnote-ref-28)
29. ibid. [↑](#footnote-ref-29)