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Evolving Roles of the International Institutions in the Implementation Mechanisms of the Rules of International Humanitarian Law

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Abstract: The dire need to expand the frontiers of the enforcement mechanism of the rules of international humanitarian law through the international institutions has been of a global concern for ages. Driven primarily by efforts to enforced and promote the rules of international humanitarian law, there is a need to develop measures capable of promoting the rules of international humanitarian law through the international institutions. The objective of this paper is to analyze and establish that expanding the frontiers of the enforcement mechanism of the rules of international humanitarian law through the international institutions bothering on individual or state responsibility will further strengthen the low level of enforcement of these rules. However, this paper noted that there is a significant enforcement gap both at the regional and international levels. Further, this paper argues that in order to guarantee a high level of enforcement of these rules both at the regional and universal levels, a more integral approach on the role of international institutions is capable of addressing the enforcement gap of the rules of international humanitarian law. This paper adopts a diagnostic approach based on a review of literatures, which is achieved

by synthesis of ideas. This paper concludes with recommendations among others that in order to boast the purpose for which the rules of international humanitarian law were made, the level of enforcement of these rules should be expanded to fill the enforcement gaps at the domestic, regional and universal levels.

***Keywords*:** enforcement; international humanitarian law; United Nations; international institutions; rules

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I. Introduction

This paper arose out of the compelling need to re-examine the principles of international humanitarian law and the institutional discourse relating to the practicability of promoting the principles of international humanitarian law through the agencies of the United Nations. Different approaches have been adopted in effecting the

realization and for effective implementation and respect of the principles of international humanitarian law amongst nations.

Despite the various attempts and approaches in the implementation of international humanitarian law, it may therefore be understood from the perspectives of a traditional institution consisting of the law regulating co-existence and cooperation between the members of the international society, that is the States, and/or international law governing the conduct of member States and their citizens. Although, it must be emphasized that international humanitarian law emerged as part of the traditional layer, that is, as law regulating belligerent inter-State relations, but today it has become nearly irrelevant unless understood within the second layer, namely as the law protecting war victims against States and others who may wage war. Thus, in line with the relevance of the principles of international humanitarian law, it must be emphasized that the international institutions have played a significant role in ensuring that these fundamental principles are respected and as well promoted. In light of the above, it should be noted that some provisions of the Charter of the United Nations[1], particularly with reference to Art. 2(4) provides that:

> *All Members shall restrain in their international relations from the threat of use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations.*

In a similar vein, Art. 2(7) further provides thus.

> *Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdictions of any State or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII of the Charter.*

However, it might sometimes be argued that for states and international organizations to enforce the compliance of the rules of

[1] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Available at: https://www.refworld.org/docid/3ae6b3930.html [Accessed 07.04.2022].

international humanitarian law, the apprehension created by the above provisions has made it a bit challenging. In addition, there is a serious argument that since the United Nations do not have international police, neutral states during armed conflicts between belligerent parties that would ordinarily interfered to broker peace with all means and methods are of course prevented from doing so because of the above provisions in Art. 2(4) of the Charter of the United Nations. This paper focuses on some of the practical or most effective means and methods of enforcing international humanitarian law principles in modern time.

In any case, it must be emphasized that since states have defied the principles of Art. 2(4) and 51 of the Charter of the United Nations to make wars and other form of forcible measures a fact of their international relations, all the laws of warfare find application for "a war is still war in the eyes of international law even though it has automatically arisen from acts of force which were not intended to be act of war" (Oppenheim, 1952, p. 299). In other words, the fact that States do not impute the character of war in their acts of force does not preclude the application of the laws of war. It is the writer's belief that this is for the common rationale of humanizing wars or forcible measures, through the balancing of military necessity with concerns for humanity (Jochnick and Normand, 1994, p. 52). In addition, this paper noted that Art. 3 Common to all the Four Geneva Conventions (1949) and Art. 1 of the Additional Protocols to the Four Geneva Conventions (1977) state that the provisions of the Conventions shall apply in all situations. In the light of the above, this paper thus seeks to examine the promotion of the principles of international humanitarian law through the institutions of the United Nations from a holistic perspective and attempts a critical, realistic and contextual assessment of the socio-legal and cultural assessment of the role of these agencies to the realization of the promotion and respect of the principles of international humanitarian law with a view to identifying the commonalities and divergences in ensuring full compliance with these principles and law they could constitute a coherent framework for adequate protection of both combatants and non-combatants in an armed conflicts or internal disturbances.

II. International Institutions and Their Contributions to the Promotion and Respect of the Rules of International Humanitarian Law

Recent challenges and developments have made the authors to examine several arguments arising from the contributions of the various international institutions in the respect and promotion of the principles of international humanitarian law around the globe since it is true that both the States and individuals are under the obligation to comply with international humanitarian law in such that non-compliance can, in some cases, render the individuals liable under penal law, as many national and international courts have acknowledged.[2] In this sense, it is important to highlight that the United Nations bodies and agencies as well as international tribunals listed below are primarily concerned with ensuring respect for humanity in time of war. They guarantee that humanity will be upheld in circumstances that threaten it.

II.1. United Nations Security Council

Basically, the activities of the United Nations bodies on the implementation of international humanitarian law began in 1949 with the adoption of the four Geneva Conventions for the protection of victims of armed conflicts in 1949. The Security Council activities in this regard are quite extensive and keep increasing. Notably, the first express mention by the Security Council of the Geneva Conventions was not couched in strong terms. More importantly, by the Resolution 237, relating to the Middle East, the Security Council recommended to the Governments concerned the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war as contained in the Geneva Conventions of 12 August 1949.[3] Also, the Security Council has taken a very large number of actions with respect to the implementation

[2] *See* Inter-Parliamentary Union Declaration Adopted without a vote by the 90th Inter-Parliamentary Conference Canberra (18 September 1993).

[3] *See* Security Council Resolution 237, U.N.SCOR, 1361st Meeting (13 June 1967).

of international humanitarian law which may be seen from the Call and Demands for respect of the rules of international humanitarian law,[4] and the determination that certain Acts constitutes violations of international humanitarian law.[5] Interestingly, the importance of the pronouncement by the Security Council on certain Acts constituting violations of international humanitarian law lies in the public pressure and however, creates responsibility on the States.[6]

That being the case, it must be emphasized that in two resolutions underway, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them.[7] Be that as it may, questions are sometimes raised as to whether expanding the role of the Security Council in the area of enforcement of the rules of international humanitarian law ever be a progressive development in the enforcement of the rules of international humanitarian law, due to suggestions that Security Council's auxiliary role to the enforcement of the rules of international humanitarian law may at times be incompatible with its independence.

Drawing from the central role assigned to the Security Council by the Charter of the United Nations which is made manifest in the prohibition of the use of force in Art. 2(4) and the conferral of "primary responsibility for the maintenance of international peace and security" on the council in Art. 24(1) of the United Nations, this paper argues that the importance accorded to the council by the San Francisco conference in 1945 was nevertheless, tampered by political realism or is more than just normative aspirations. More so, in order to provide an effective response, Art. 40 of the Charter provide that, before making recommendation or deciding upon measures provided for in Art. 39, the council may "call upon the parties concerned to comply with such

[4] *See* Security Council Resolution 307, 3 U.N.SCOR, 1621st Meeting (21 December 1971).

[5] *See* Security Council Resolution 452 U.N.SCOR, 2159th Meeting, 3 (20 July 1979).

[6] *Ibid.*

[7] International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Dusko Tadic* (Jurisdiction) IT-94-1-AR72 (1995), Para. 133.

provisional measures as it deems necessary or desirable. Also, Art. 41 of the Charter empowers it to decide what measures not involving the use of armed force are to be employed to give effect to its decisions.

It goes without saying that Art. 42 of the Charter allows the Security Council to take such actions as may be necessary to maintain or restore international peace and security. However, prior to 1990, action under Chapter VII of the Charter of the United Nations was as inconsistent as it was infrequent. Furthermore, it is much more realistic and common place in practice to maintain that in recent times, the intents of the Security Council in the enforcement of the rules of international humanitarian law is to promote a peaceful resolution of the conflict without pronouncing upon the question of its international or internal nature as reflected by the Report of the Secretary-General of 3 May 1993 and by the statements of Security Council members regarding their interpretation of the Statute. This argument ignores, however that as often as the Security Council has invoked the grave breaches provisions, it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in international armed conflicts as the case may be.[8]

Against this backdrop, and judging from the enforcement of the rules of international humanitarian law by the Security Council, it is understandable from the above provisions that in the absence of agreements under Art. 43 of the Charter, the command and control of the Secretary General should prevail. It is important to note that the United Nations peacekeeping force in the Republic of Congo was authorized to use force to end the civil war between 1961 and 1964, but remained under the command and control of this Secretary General. It has been argued that this constituted an enforcement action under Chapter VII of the Charter,[9] but this is a minority position. The rationale behind the use of force according to the Secretary General was essentially an internal security measure taken by the Security Council at the invitation of the Congolese government, perhaps implicitly under Art. 40 of the Charter (Seyersted, 1961, p. 446).

[8] *Prosecutor v. Tadic*, IT-94-1-AR72, Appeal Chamber, Decision (2 October 1999), Para. 74–75.

[9] Charter of the United Nations, Art. 43.

With regard to the procedure that came to characterize the United Nations' involvement in maintaining peace and security during the Cold War, however, one should note that peacekeeping operations were traditionally non-threatening and impartial, governed by the principles of consent and minimum force. It may be argued that the legality of peacekeeping operations on the basis that Chapter VII must be read as providing the only legitimate basis for the decision to use military is very difficult to accept. However, with the above characteristics, peacekeeping operations have expanded in number and scope as well as enforcement actions of the rules of international humanitarian law. It is submitted that the most basic transformation in the use of Security Council powers is that, it now appears to be broadly accepted that a civil war or internal strife may constitute a threat to international peace and security within the meaning of Art. 39.

II.2. United Nations Peacekeeping Force

Generally, the idea of the United Nations Peacekeeping Operations or Forces was developed by the United Nations whereby the presence of national or multi-national troops in an area of hostility can reduce tension and pave the way for negotiations that would bring about sustainable peace and re-unity. These positive obligations under the United Nations, of course, impose obligations on State parties to international humanitarian law treaties to ensure respect and compliance with the rules thereof. From an operational point of view, and in literal terms, it may be argued that since not all States are parties to the international humanitarian law treaties, how then can the rules of international humanitarian law be universally applied and respected and/or be legally binding on such a State who has not ratified the treaty? However, as the respect and compliance with the rules of international humanitarian law become more complex given the above scenario, the challenges of understanding the phenomenon of peacekeeping operations under international law becomes more daunting.

Admittedly, it must be emphasized that peacekeeping operations are not only geared toward assisting the host nations to rebuild and provide security, and public order, but also to help them restating es-

sential service and also tackle the root causes of the conflict thereby achieving an enduring peace and unity. On the other hand, while the relevance of peacekeeping operations cannot be overemphasized, one might argue that peacekeeping has been looked at as an instrument of choice in international conflict management after the cold war. In a similar vein, this paper also noted that the application of international humanitarian law to United Nations Forces or Peace Support Operations as they are often conservatively styled has drawn considerable contentions over the years.[10] The thrust of this argument is that, as an organization, the United Nations and many Regional International Organizations and peace support organizations are not signatories or part of the High contracting parties to the existing conventions, even though the United Nations itself, by the authority given to it to create and employ armed forces has the correlative authority to make treaties to protect such forces (Bowelt, 1964, p. 224).

In this respect, it should be pointed out that if peacekeeping troops protect civilians and disarm combatants, they will promote greater respect for international humanitarian law. However, this is exemplified when peacekeeping forces facilitate the provision of humanitarian assistance to noncombatants in the form of food, shelter, health care, and sanitation. But conversely, it should be fairly uncontroversial to state that given the increasing pace of peacekeeping operations in ensuring maximum compliance of the rules of international humanitarian law, the idea espoused in this paper is situated within the context of different understanding of the concept of peacekeeping operations. Interestingly, it is widely accepted that peacekeeping forces have also been implicated in sexual exploitation and sexual violence against war-affected populations, including the abuse of women, who lived in refugee and displaced persons camps and under the care of those very peacekeepers.[11]

Put differently, it should be borne in mind that, the changing character of peacekeepers as international policemen in war times, considering the volatility and complexity of their job, an appropriate and

[10] *See* United Nations Document ST/SGB/1999/13 of 6 August 1999.

[11] United Nations Security Council Adopted Resolution 1188 (2009).

powerful mandate is given to them to enable, handle and responsively approach parties that oppose or obstruct peace. This is the assumption underlying the fact that this is where international humanitarian law applicability comes to play. This dominant view suggests in an attempt to sustain or address the issue and for the purposes of setting out fundamental principles and rules of international humanitarian law that apply to forces conducting operations under the United Nations Command and Control, the United Nations Secretary General released a Bulletin.[12]

Thus, Section 1 of the Bulletin provides that:

> *The fundamental principles of international humanitarian law set out in the bulletin are applied to the United Nations Forces when in situations of armed conflicts, they are actively engaged therein as combatants to the extent and for the duration of their engagement.*

II.3. International Court of Justice (ICJ)

Again, opinions on this issue will differ, but even if it does not justify any reason given by the Charter of the United Nations, the obvious reason remains that according to Art. 93 of the Charter all members of the United Nations are automatically parties to the International Court of Justice (ICJ), even non-members of the United Nations may also become parties to the Court's Statute under Art. 93(2) of the Charter.

Pursuant to the above provisions of the charter, it must be acknowledged that in keeping with the burning desire in ensuring that the rules of international humanitarian law are respected and promoted accordingly by state parties and individuals, it should be noted that the International Court of Justice (ICJ) has had the occasion to deal with questions of humanitarian law in three highly notable cases concerning *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America),[13] the *Corfu Channel* case (UK

[12] United Nations Document St/SGB/1999/13 of 6 August 1999.

[13] Nicaragua v. United States of America, Merits, International Court of Justice (ICJ), 27 June 1986. Available at: https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf [Accessed 23.11.2022].

v. Albania)[14] and Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro.[15] The ICJ has also contributed to the enforcement and promotion of the rules of international humanitarian law through its advisory opinions addressing such issues as the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,[16] the Legality of the Threat or Use of Nuclear Weapons[17] and Constructing a Wall in the Palestinian Territory[18] in 2004.

The important aspect of this section is to further highlight the fact that prior to the emergence of the International Criminal Court (ICC), the International Court of Justice entertained matters bordering on offences of genocide and crimes against humanity as demonstrated in the past where there were several cases of violation of international humanitarian law. That said, the significant role of the ICJ in the implementation of international humanitarian law cannot be overemphasized. On this basis, one can safely maintain that the international criminal justice has been deeply involved in the interpretation of the rules of international humanitarian law (Frenkel et al., 2020). Be that as it may, the International Court of Justice is perceived as the guardian

[14] Corfu Channel Case (United Kingdom v. Albania), International Court of Justice (ICJ), Judgement, 9 April 1949. Available at: https://www.icj-cij.org/public/files/case-related/1/001-19490409-JUD-01-00-EN.pdf [Accessed 23.11.2022].

[15] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, p. 43. Available at: https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf [Accessed 23.11.2022].

[16] International Court of Justice Report, Advisory Opinion Concerning Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, 28 May 1951. Available at: https://www.icj-cij.org/public/files/case-related/12/012-19510528-ADV-01-00-EN.pdf [Accessed 26.11.2022].

[17] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996. Available at: https://www.icj-cij.org/public/files/case-related/93/093-19960708-ADV-01-00-EN.pdf [Accessed 26.11.2022].

[18] The Construction of a Wall in the Palestinian Occupied Territories (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories), ICJ Reports 2004, p. 136 (Wall Opinion). Available at: https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf [Accessed 26.11.2022].

of the unity of humanitarian law (Raimondo, 2007, pp. 593–611). It is clear from the above that the focus of an international humanitarian law case before the International Criminal Justice is not whether a particular individual has committed genocide, a war crime or crime against humanity, but whether one of the States Party to the case has incurred international responsibility for a breach of international law and/or international humanitarian law. In this regard, it allows ICJ to appreciate the details of particular incidents and examine patterns of conduct. Also, an important limit to the contentious jurisdiction is that it depends on both parties to a case having submitted themselves to the jurisdiction of the International Court of Justice.[19]

Furthermore, it must be emphasized that the ICJ also possessed an advisory jurisdiction which permits it to give an advisory opinion on any legal questions if it requested to do so by the United Nations General Assembly, the Security Council or any organ of the United Nations. That said, it is important to note that two opinions of the ICJ on nuclear weapons (Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly), ICJ Reports 1996,[20] and the Construction of a Wall in the Palestinian occupied territories (Legal Consequences of the construction of the Wall in the Occupied Palestinian, ICJ Reports 2004 (Wall Opinion)[21] are an important contribution to the understanding of international humanitarian law.

II.4. International Financial Institutions

Basically, it is obvious and well settled that apart from the respective role played by the above mentioned bodies of the United Nations in the development and promotion of the rules of international humanitarian law through their involvement in resolving crises between the parties to an armed conflict, it can therefore be said that such UN specialized agencies as the international financial institutions are increasingly

[19] United Nations, Statute of the International Court of Justice (adopted June 1945 and entered into force 18 April 1946), Art. 36.

[20] *See* ICJ Reports on Nuclear Weapon Opinion 1996, p. 226.

[21] *See* The Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, p. 136.

involved in conflict situations and countries in which the violations of international humanitarian law are widely spread and devastating to civilian population and the country's economic prospects. Their establishment is rooted in the Bretton Woods Conference.[22] It must be stressed that it was envisaged as one of the three pillars of the international economic system focusing at the outset of the financing of post-war reconstruction and development.

It is submitted here that international financial institutions assistance can take a number of forms through aid, loans; and or other measures to encourage of facilitate the promotion of international humanitarian law during armed conflict between parties to the conflict. According to the World Bank Report,[23] there are now over 150 agencies involved in development assistance including "South-South exchanges of financial resources." However, it has been widely noted that although the Articles of Agreement of the major international financial institutions prevent them from involvement into political affairs of member states,[24] this paper noted that sometimes the United Nations may jettison this provision. To an extent, it could be argued that the influence of the international financial institutions like the World Bank Group and the International Monetary Fund led to the promotion of international humanitarian law during the apartheid regime of South Africa wherein, the World Bank and the IMF were prevailed upon to stop dealing with the apartheid regimes.

Indeed, the World Bank Group plays an important role in development assistance such that it is generally described as the Premier development institution" in International economic relations. Against this background, this paper however, asked whether international financial institutions are appropriate agents for the promotion, adherence to and enforcement of international humanitarian law? Are they capable to do so? These questions are of extremely importance to the issue of promoting the rules or international humanitarian law.

[22] United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, United States of America, 1944.

[23] World Bank: "New World, New World Bank Group: Post Crisis Direction", 2010, Para. 6 (DC 2010-0003).

[24] World Bank Articles of Agreement (adopted 20 July 1956), Section 10.

Given the significant constraints on the structural and political concerns which have posed obstacles to the development of a role and function international financial institutions with respect to international humanitarian law, it may be argued that the role and function of the international financial institutions in the international community enable then to make some contributions to the implementation and enforcement on international humanitarian law and that factoring humanitarian law violations into their decision making processes which can actually be essential to the effective implementation of their own mandates of greater concern is that international financial institutions involvement in international humanitarian law can also support efforts by the United Nations and the international community in preventing and limiting violations of international humanitarian law and as well enforce the law against those suspected of committing atrocities. It must be emphasized that the World Bank and the IMF are specialized agencies of the United Nations that function as independent international organizations not bound by most of the General Assembly decisions, instead they are bound by the UN Security Council resolutions.[25] Acknowledging the above provisions of the Charter of the United Nations, this Charter however, imposes strict obligation on the international institutions the activities of which should be tailored towards the provisions of Chapter VII resolutions in order to ensure that they do not contravene the binding decisions and actions of the United Nations. This threshold is understood to imply that any effort aims at promoting a role for the international financial institutions in international humanitarian law must be capable of addressing the accountability and political questions raised by the international financial institutions' governance structures and the legal questions raised by the limited mandates of the international financial institutions as special economic organizations.

However, it must be noted that international financial institutions in the implementation and enforcement of international humanitarian law should not always withdraw or reduce funding, but rather should consider the impact of international humanitarian law violations as a factor in making policy and decisions (Blank, 2002, p. 42).

[25] Charter of the United Nations, Chapter VII.

II.5. International Criminal Court (ICC)

Absolutely, the International Criminal Court is a permanent tribunal established by the international community to prosecute individuals for genocide, crimes against humanity, war crimes and the crimes of aggression. It is important to highlight that the international criminal court is a new mechanism for the enforcement of international humanitarian law.[26] A key concern is that, this court was established on the 17 July 1998 in Rome with the primary purpose of arresting and trying all persons involved in violating the rules of international humanitarian law. In that sense, it is a properly constituted court of competent jurisdiction.

Generally, aside from being a court of competent jurisdiction, there are other emerging challenges ranging from the tension inscribed in the statute between the particular interests of states and the normative interest of the international community as a whole in repressing crimes under international law which of course, lies at the heart of the international criminal system. It could be argued that how successfully the drafters of the statute struck the balance between these two competing impulses will ultimately determine the effectiveness and legitimacy of the Court. In other words, this paper noted that, in a technical sense, it is worth emphasizing that this tension of dichotomy is itself the product of the fact that the statute is a treaty, and not some other form of instrument. Furthermore, it must be borne in mind that the Preamble and Art. 1 of the Rome Statute declare that the International Criminal Court is to provide "complementarity" to national jurisdictions. It might be argued that it is in the context of complying with the provisions of Art. 1 of the Rome Statute that the notion of "complementarily" was overwhelmingly agreed upon at every stage of the negotiations from the international law commission Draft to the Rome Statute, thus ensuring that the ICC would not supersede national courts, which are to retain primary responsibility for investigation and prosecuting international crimes (Holmes, 1999, p. 73). However, it

[26] United Nations General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, UN DOC. PCNICC/1999/INF/3, Art. 126. Available at: https://www.refworld.org/docid/3ae6b3a84.html [Accessed 23.11.2022].

would be argued that notwithstanding the agreement in principle to complementarity, the question of whether national authorities or the ICC should decide on the admissibility of a case before the Court and on the criteria to be applied, remained contentious. The same can be said that the authority to decide the admissibility of cases before the ICC often times are carefully circumscribed to make them acceptable to states. In this sense, it can be said that the resulting balance has made the complementarity regime "one of the cornerstones on which the future international criminal court will derive its powers" (Imoedemne, 2017, pp. 89–121; Bleich, 1997, p. 231).

Another crucial point to note in this paper is that international law prescribes certain rules of behavior for states, and it is up to every state to decide on practical measures or penal or administrative legislation to ensure that individuals whose conduct is attributable to it, or under some primary rules, and/or even all individuals under its jurisdiction comply with those rules. Indeed, only human beings can violate or respect rules. Aside from this substantive requirement, it should be pointed out that international humanitarian law obliges states to suppress all its violations that amount to war crimes which of course, are criminalized by international humanitarian law. However, this concept of war crimes includes, but is not limited to the violations listed and defined in the conventions and Protocol I as grave breaches.[27] Moreover, it must be emphasized that international criminal court represents a delicate balancing act in the enforcement and promotion of the rules of international humanitarian law. However, this perspective is particularly significant for the understanding that the Rome Statute of the ICC has also criminalized widespread and severe damage to the natural environment,[28] the recruitment of child soldiers[29] and all violation of Common Art. 3 of the Four Geneva Conventions of 12 August 1949, particularly in armed conflicts not of an international character.[30]

[27] Geneva Conventions I–IV 1949, Art. 50, 51, 130, 147 of Geneva Convention 1949, Art. 11(4), 85 and 86 of Additional Protocol 1 of 1977.

[28] Rome Statute of the International Criminal Court, Art. 8(2)(b)(iv).

[29] *Ibid*, Art. 8(2)(b)(xxvi).

[30] *Ibid*, Art. 8(2)(c).

In the context of the above development, and on the account of the seriousness that the international criminal court attaches to the enforcement of international humanitarian law in non-international conflicts or civil wars that the first amendments to the Rome Statute, which came up in Kampala, Uganda proposed inclusion of the use of certain weapons as war crimes in the context of an armed conflicts not of an international character. Thus, the obvious reason behind this is to achieve military objective without causing a superfluous or unnecessary suffering or damage to the civilians or civilian objects (Greenwood, 1995, pp. 30–31). Essentially, it must be understood that another unique aspect of the international criminal court as far as the violation and promotion of international humanitarian law is concerned, lies in the Rome Statute's extension of acts of criminality in warfare to gender crimes, comprising rape, sexual slavery, enforced prostitution, forced pregnancy and other forms of sexual violence, including trafficking in women and children.[31] For purposes of clarity of the above section, it may however be safe to hold that these gender crimes are now characterized as crimes against humanity which makes the international criminal court the most far-reaching institution of international criminal justice addressing gender and sexual violence.

It goes without saying that one of the most formidable aspects of the international criminal court's problems is its contamination by political sentiments and as a result, lack of wide spread global acceptance. Thus, given these realities and all efforts to rid the international criminal justice of the political smear, this taint is still very much visible, now prompting a situation in which some of the culprits of the international humanitarian law violations are not brought to justice (Moghalu, 2008, p. 4), especially those perpetrated by the superpowers. In another vein, it is also crucially important to note that the jurisdiction of the court rests on the assumption that it compliments national criminal jurisdictions.[32] This means that the Court is not allowed to exercise its jurisdiction over a case if a state has exercised its domestic criminal jurisdiction over the same case. Thus, the rule of complementarity in the ICC differs from the cases in International Criminal Tribunal of Former Yugoslavia

[31] *Ibid*, Art. (1)(c) and 7(2)(c).

[32] *Ibid*, Art. 17.

(ICTY) and International Criminal Tribunal of Rwanda (ICTR) whose jurisdictions take precedence over the national criminal jurisdictions of the relevant states.[33]

II.6. International Tribunals

The establishment of the international criminal tribunals as a measure under Charter VII of the United Nations taken by United Nations Security Council[34] cannot be overemphasized. Thus, these tribunals are temporal in nature created for the purposes of punishing war crimes committed in relation to two specific contexts; the former Yugoslavia (the International Criminal Tribunal for the former Yugoslavia (ICTY)) and Rwanda (the International Criminal Tribunal for Rwanda (ICTR)). It is worth mentioning the fact that since international humanitarian law seeks to protect the victims of armed conflict and to limit the means and methods of warfare, serious violations of this law constitute war crimes.

While there are serious questions with regard to the establishment of the International Tribunals, it should be noted that the Appeals Chamber in *Prosecutor v. Tadic*.[35] stated,

> *Art. 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regards, and it has been otherwise, as such as a choice involved political evaluation of highly complex and dynamic situations.*

Beyond this work, it is becoming increasingly clear that the work of both Tribunals has shown that international investigation and international prosecution of persons responsible for serious violation of international humanitarian law are possible and realizable. Crucially important in this regard is that these developments have given new

[33] United Nations Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), 25 May 1993, Art. 2(2). Available at: https://www.refworld.org/docid/3dda28414.html [Accessed 23.11.2022]; United Nations Security Council, Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, Art. 8(2). Available at: https://www.refworld.org/docid/3ae6b3952c.html [Accessed 23.11.2022].

[34] Charter of the United Nations, Chapter VII.

[35] IT-94-1-AR72 Appeals Chamber Decision, 2 October 1995, Para. 39.

vigor to the principles of universal jurisdiction, and have encouraged at least some prosecutions by various states of persons responsible for gross violations of the rules of international humanitarian law. It should be noted that the contribution of the Hague Tribunal was to advance the concept of the applicability of the Hague law to non-international conflicts. In addition, the Hague Tribunal has also given a very expansive, yet credible, reading to international customary law.[36] More so, in examining the import of Art. 3 of the Geneva Conventions the Appeal chamber held that:

> *Article 3 functions as a residual clause designed to ensure that no serious violations of international humanitarian law are taken away from the Jurisdictions of the International Tribunal.*

This construction of Art. 3 is also corroborated by the object and purpose of the provision. In terms of the legal acceptability of these systems, the Security Council when establishing the international tribunals did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and in Rwanda. Thus, Art. 3 is intended to realize that undertaking by endowing the international tribunal with the power to prosecute all "serious violations" of international humanitarian law.

From the foregoing, we could also point to fact that the Nuremberg Tribunal emphasized the relationship between the treaty-based and customary rules of international humanitarian law prohibiting certain forms of individual conduct and it had the mandate to apply that positive legal order. Another important aspect is that the 1949 Geneva Conventions for the protection of the victims of armed conflicts define a series of acts as grave breaches of their rules and stipulate that the States Parties are under the obligation to search for persons alleged to have committed them or to have ordered them to be committed, and to bring them before their own courts or, if they prefer, to hand them over for trial to another state provided that the state has made out a prima facie case against them.[37]

[36] *See* The Appeals Chamber in *Prosecutor v. Tadic,* IT-94-1-AR72 (1995) Para. 39. Available at: https://www.refworld.org/cases/ICTY/40277f504.htm [Accessed 05.11.2022].

[37] Art. 49 GC I; Art. 50 GC II; Art. 129 GC III; Art. 146 GC IV of 1949.

With these considerations in mind, the Statute of the ICTY and the ICTR, and the Rome Statute of the ICC[38] also collaborate on the assumption of individual criminal responsibility. Basically, this type of responsibility has been accepted generally in the absence of any controversy. It has become part of international law which originally only regulated relations between states and under which only states could be held accountable for the commission of an internationally unlawful act, even though the responsibility may be civil in appearance.[39]

On the other hand, it is important to understand that criminal responsibility rests with national persons who commit an act specifically defined as a crime by international law. It is important to understand that international Tribunals in the enforcement of the rules of international humanitarian law have expanded the notion of war crimes. Indeed, since the material jurisdiction attributed to the ICTR by the Security Council at the point of its establishment bothers on rules that, at some point of its establishment formed part of both international custom and treaty-based law, however, in this context, the ICTY decisions will explain better on the institution of the Nuremberg Tribunal, on whether the notion of war crime has been expanded or not. Notwithstanding, these important advances in terms of the expanded notion of war crimes, the fact remains that this notion applies not only to grave breaches of the rules 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 internal.

III. Levels of Enforcement of the Rules of International Humanitarian Law

It is obvious from the preceding sections that international humanitarian law is a set of rules designed to protect persons who are not, or no longer, participating in hostilities and to limit the methods

[38] Rome Statute of the International Criminal Court, Art. 25.

[39] The United Nations General Assembly Resolution A/56/83 on the Responsibility of States for Internationally Wrongful Act (adopted by the General Assembly 28 January 2002, A/RES/56/83), Available at: https:// www.refworld.org/ docid/3da44ad10.html [Accessed 22.11.2022].

and means of waging war. That is to say that, it also sets out mechanisms designed to ensure compliance with the rules of this branch of law. However, in order to meet these obligations, this paper will henceforth examine the level of enforcement of these rules at different levels.

III.1. Universal Level of Enforcement

The above overview of emerging challenges in the enforcement of the rules of international humanitarian law at all levels operation highlights that as enforcement become more complex and challenging, measures should be adopted by the United Nations in order to understand the complex manner in which the enforcement mechanism will be capable to address the level of violation of these rules at the international level. Perhaps the most important point to note is that the United Nations through its collaborative efforts with *ad hoc* international criminal tribunals and as well as the cooperation with the International Criminal Court is capable of addressing these challenges.

Be that as it may, the United Nations set up international criminal tribunals to try crimes committed in the former Yugoslavia known as the ICTY as well as the ICTR, respectively, to try crimes committed in both countries. In this context, these tribunals have primacy over national courts, which may at any stages of the proceedings, formally request national courts to defer to their competence.[40] However, States are obliged to cooperate with these tribunals in the investigation and prosecution of persons accused of committing serious violations of the rules of international humanitarian law. States must also comply with the tribunal in areas bothering on the identification and location of persons testimony and production of evidence, service or document, the arrest and detention of persons, the surrender of the transfer of the accused to the tribunal in question. Thus, the specific question that arises in the above context is whether states who are not parties to the

[40] International Criminal Tribunal for the Former Yugoslavia (ICTY), 25 May 1993, Art. 9(2). *The Prosecutor v. Dusko Tadic* (Jurisdiction) IT-94-1-AR 72 Appeal Chambers, Decision (1995), and International Criminal Tribunal for Rwanda (ICTR) 8 November 1994, Art. 8(2).

treaty could be bound by this. The answer depends on the consent given by such a state who may or may not be a party to such a treaty.

In a similar vein, the enforcement of the rules of international humanitarian law could be done through a mutual cooperation with the International Criminal Court. In this case, the ICC exercises its jurisdiction only when a state is unwilling or genuinely unable to carry out investigation or prosecution over alleged crime of violation. This paper however, submits that the international criminal courts effectiveness is dependent on the level of cooperation given to it by the state. In this sense, it must be acknowledged that states parties must cooperate fully with the ICC in its investigation and prosecution of crime within its jurisdiction bothering on genocides, crime against humanity, war crimes, and the crime of aggression.[41] Also the ICC may as well invite any state not party to its Statute to provide assistance on the basis of an ad hoc arrangement an agreement or on any other appropriate basis.[42] Moreso, states parties must ensure that there are procedure available under their national laws for this form of mutual cooperation's to succeed.[43] Thus, the states cannot circumvent their obligations by their own designation of the act.

Nonetheless, while it is true that in a specific situation and upon the request of a state party to the Statute, the international criminal courts may provide assistance to the state in an investigation into or a trial in respect of conduct which constitutes a crime within the jurisdiction of the ICC or which constitutes serious crime under the national laws of the requesting state. In other words, the ICC may also grant a request for assistance from a state which is not party to the ICC Statute.[44] Against this background, it is important to recall that cooperation between state and with international jurisdiction is essential to the smooth running of the system as well as enforcement of the rules of international humanitarian laws at international level of operation of the ICC. Indeed, the need for mutual assistance is especially evident in the case of offences where these allegedly responsible must be brought to trial or

[41] Rome Statute of the International Criminal Court, Art. 86.

[42] *Ibid*, Art. 87(5)(a).

[43] *Ibid*, Art. 88.

[44] *Ibid*, Art. 93(10).

extradited by state. According to Art. 88 of Additional Protocol I, grave breaches of the Geneva Conventions or their Additional Protocols, and the specific obligations to cooperate in a matter of extradition, broadest possible mutual legal assistance among state parties in this regards, is necessary in a similar vein, it is particularly important to state that Art. 18 and 19 of the second Protocol[45] to the Hague Convention of 1954 for the protection of cultural property in the event of armed conflicts[46] also address the issues of extradition and judicial cooperation.

III.2. Regional Level of Enforcement

At this level of operation, this paper noted that regional human rights mechanism is however, increasingly examining violations of the rules of international humanitarian law. This would suggest that the European Court of Human Rights is the central piece of the European system of human rights protection under the 1950 European Convention on Human Rights,[47] while in Americas, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights[48] are in charge and, of course, the African Commission on Human and Peoples' Rights is the supervisory body established under the 1981 African Charter and the 1998 Protocol to it is the treaty establishing an African Human Rights Court.[49] In addition, in light of the fact that the African Human Rights system and its capacity to deal with violations of

[45] *See* Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, Art. 18 and 19. Available at: https://en.unesco.org/sites/default/files/1999_protocol_text_en_2020.pdf [Accessed 26.11.2022].

[46] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954 and entered into force 7 August 1956). Available at: https://en.unesco.org/sites/default/files/1954_Convention_EN_2020.pdf [Accessed 26.11.2022].

[47] European Convention on Human Rights (adopted 4 November 1950, ETS 5). Available at: https://www.refworld.org/docid/3ae6b3b04.html [Accessed 26.11.2022].

[48] Statute of the Inter-American Court on Human Rights (adopted 10 October 1979 and entered into force 1 January 1980). Available at: https://www.refworld.org/docid/3decb38a4.html [Accessed 26.11.2022].

[49] African Charter on Human and People's Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 211. L.M.58 (1982). Available at: https://www.refword.org/docid/3ae6b3630.html [Accessed 26.11.2022].

international humanitarian law have thus far received little scholarly attention, it must be emphasized that there are instances where the African Court on Human and Peoples Rights can directly apply norms of international humanitarian law (Viljoen, 2014, p. 333). However, there are three avenues where African Court can engage with international humanitarian law such as firstly, through reference to international humanitarian law in the substantive norms of relevant human rights treaties, secondly, by way of its subject — matter jurisdiction, and thirdly, through its interpretative competence. It seems clear that in the first category where there is a proper incorporation by reference to international humanitarian law obligations into a human rights treaty in respect of which the African Court may exercise subject — matter jurisdiction, the court will then have jurisdiction in respect of the incorporated international humanitarian law obligations. In a similar situation, reference to international humanitarian law obligations that are not incorporated serves to acknowledge the relevance of international humanitarian law to the rights in discourse, as well as the connection between the observance of international humanitarian law and the enjoyment of human rights and provides a basis upon which to engage in contextual analysis that considers the impact of the State in giving effect to its human rights obligations.

Generally speaking, the enforcement of the rules of international humanitarian law at the regional level takes places through different modes of non-judicial and judicial mechanisms which ensure that human rights are respected and promoted during armed conflicts, whether of international or none-international nature. Moreover, given the mutual relationship between international humanitarian law and human rights law as well as the prevailing situations of armed conflicts around globe, it must be emphasized that regional institutions dealing with human rights have been able to address cases of breaches of the rules of international humanitarian law. However, there is a strong argument that these regional human right courts are ill-equipped to handle mass atrocity crimes. The paper is of the view that their caselaw is important for the enforcement of the rules of international humanitarian law, especially when it has to do with state responsibility in situation of armed conflicts.

III.3. National Level of Enforcement

In view of the challenges frequently encountered in the enforcement of rules international humanitarian law at the national level, consideration should be given to the nature and extent of the responsibility for violations of the rules. Thus, such responsibility may raise numerous legal questions, including whether the perpetrators bear individual responsibility for the violations they commit and the guilty of serious violations must be prosecuted and punished. However, it is common knowledge that the Four Geneva Conventions of 1949 (GC I-IV), their Additional Protocols of 1977 (AP I, AP II) and other treaties set forth for State Parties explicit obligations regarding penal repression of serious violations of the rules they contain.

Firstly, in line with the provisions of the Geneva Conventions of 1949 and their Additional Protocols of 1977, this must be borne in mind when considering the nature of responsibility and analysis must be put in its proper context. An understanding that the state party to the Geneva Conventions and Additional Protocols of 1977 must prevent and halt any acts contravening these instruments no matter whether they are committed in an international or non-international armed conflicts is necessary to ensure that the measures that state must take to this end may vary in nature and may include penal sanctions if necessary. However, it is important to bear a number of considerations in mind. In the situations under review, it must be emphasized that at the National level of enforcement of the rules, the national government have further obligations relating to certain flagrant violations of international humanitarian law as well as the grave breaches. However, these precise acts listed in the Geneva Conventions and Additional Protocol I, such as willful killing, torture and inhuman treatment, will fully cause great sufferings or serious injury to body or health, and certain violations of the basic rules for the conduct of hostilities.[50]

Secondly, in repressing grave breaches of the Geneva Conventions and Additional Protocol I, it must be pointed out that the law is not the answer in itself, nor the only element to consider; policy and operational considerations are equally important. However, the Geneva

[50] Art. 39, 50, 129 and 146 GC I; Art. 85 Para. 1 AP I.

Conventions and Additional Protocol I stipulate that "grave breaches" must be punished accordingly at all levels. It is for these reasons that the States Parties must search for persons accused of having committed or having ordered the commission of grave breaches, regardless of the nationality of the perpetrator or the locus of the crime, in accordance with the principle of universal jurisdiction. These perpetrators must be brought to their national court, or be handed over for trial in another state which has made out a *prime facie* case.[51] Also it should be noted that Additional Protocol I[52] applies to the State Party in case of grave breaches resulting from a failure to act when under a duty to do so.

It is now generally accepted that in order to meet up with these obligations, State Parties must adopt the legislative measures needed to punish persons responsible for grave breaches through the enactment of laws that will prohibit any repression and will apply to everyone irrespective of his status who has committed or ordered the commission of such offences and ensure that these laws relate to acts committed in the national territory and/or elsewhere. In addition, it is worth mentioning that attention should be drawn to amendments to the national legislation which were made to complement the provisions of the Geneva Conventions, some of which, as this paper noted, go so far as to make it possible for national courts to convict the persons responsible for violations of rules concerning internal armed conflicts. This holds true for the Criminal Code of the Socialist Federal Republic of Yugoslavia, of 1999, as amended for the purpose of making the 1949 Geneva Conventions applicable at the national criminal level. In any event it must be stated that Art. 142 clearly provided for war crimes against the civilian population, while Art. 143 expressly provided for war crimes in respect of the wounded and the sick. However, the above situations apply at the time of war, an armed conflict or occupation, this would seem to imply that they also apply to an internal armed conflict.

In view of the above, necessity could be invoked to justify this position. Without any ambiguity, Belgian law enacted in 1993 for the implementation of 1949 Geneva Conventions and the two Additional Protocols, provides that Belgian Courts have jurisdiction to adjudicate

[51] Art. 39 GC I; Art. 50 GC II; Art. 129 GC IV; Art. 146 GC IV; Art. 85 Para. 1 AP I.
[52] Art. 86 Para. 1 AP I.

breaches of Additional Protocol II to the Geneva Convention relating to the victims of a non-international armed conflict. However, Art. 1 of this law[53] provides that the series of grave breaches of the four Geneva Conventions and the two Additional Protocols listed in the same Art. 1, constitute international law crimes. Thus, to state the obvious, the legislator has a number of options for translating serious violations of international humanitarian law into national penal legislations and for making the criminal acts constituting them subject to domestic law.

IV. Conclusion

We hope that this paper will contribute to clarifying an essential aspect of international humanitarian law, and especially, that it will help to determine more precisely the level of commitment of the institutions of United Nations in ensuring that international humanitarian law should be respected and promoted. It argues that, several international institutions are involved in the development and promotion of international humanitarian law, but not all have the same capacity. In this sense, it can be justifiably concluded that the United Nations institutions involvement in the development and promotion of international humanitarian law is more recent, but they have the capacity of ensuring respect for the rules of international humanitarian law if they so wish. Among them it is the UN Security Council that has primary responsibility, under the Charter of the United Nations, for the maintenance of international peace and security. It is for the Security Council to determine when and where a United Nations peacekeeping operation should be deployed.

As broadly examined in this paper, it is submitted that both Chapters VI and VII of the Charter of the United Nations entrusted the responsibility of preventing threats to peace, suppression of acts of aggression, and peaceful settlement of international disputes to the Security Council. However, as the article has explored, despite the various roles played by the international institutions in the enforcement of the rules of international humanitarian law, the level of their participation

[53] Article of the Geneva Conventions, 1949. International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecuter v. Dusko Tadic* (Jurisdiction) 1T-94-1-AR 72, Appeals Chamber, Decision, 1995.

in the enforcement agenda of the rules of international humanitarian law cannot be taken for granted. Furthermore, while it is accepted that the Security Council can impose sanctions on those states that violate international humanitarian law, it is imperative to suggest that these sanctions can be achieved through the authorization of military operations that can lead to the establishment of *ad hoc* international criminal tribunals to prosecute violations of international humanitarian law. Finally, this paper argues that the fact that the Security Council prefers to establish its own *ad hoc* commissions to investigate violations of international humanitarian law rather than resort to the findings of the Commission provided for in Art. 90 of the Additional Protocol I, clearly shows that it has regards to international humanitarian law.

Ultimately, while it is clear that the United Nations institutions are major role players in ensuring respect and promotion of the rules of international humanitarian law, it must be emphasized that they are faced with numerous challenges as the nature of armed conflicts and contemporary weapons of warfare evolves. That being said, armed conflicts, indiscriminate violence and acts of terror have continued to threaten the safety and security of innocent people and undermine efforts to bring about a lasting peace and stability around the globe.

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