

The impact of military disciplinary sanctions on compliance with international humanitarian law

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Abstract

The impact of disciplinary military sanctions on respect for international humanitarian law depends on the extent to which the principles governing that law have been integrated into the disciplinary rules of the armed forces and the range of responsibility of the commanding officer giving an order which breaches international humanitarian law or which does not ensure respect for it. Whereas the armed forces rely on a strong principle of obedience, respect for international humanitarian law depends essentially on the superior officer whose responsibility is subject to sanctions imposed by international criminal judges within a judicial system which aims to make sanctions an effective means of ensuring respect for international humanitarian law.

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Disciplinary law applies sanctions to those members of a specific body within a society, be it public or private, who have acted in a manner contrary to the collective interests of the body to which they belong. Disciplinary sanctions are therefore administrative in nature and differ from penal sanctions, which punish behaviour on the part of the individual that affects society in general. Just like doctors and judges, whose professional activity has important consequences for

* The opinions expressed are those of the author alone.

society, military personnel are subject to both disciplinary and criminal law. This is probably even more valid for military personnel, whose role is ultimately to use force or threaten to use force to protect the state's interests. Rigorous supervision of the armed forces and strict internal discipline are required to ensure that military personnel obey orders when in danger and do not abuse their power.

The main aim of disciplinary law is to give the hierarchical principle its effectiveness, by making it possible to punish behaviour that impedes the smooth running of the service. It is primarily a means of ensuring obedience to superiors and the execution of the task assigned by the political authorities. In order to assess the impact of military disciplinary sanctions on compliance with international humanitarian law, the content of disciplinary law must first be examined: the greater the extent to which the principles of international humanitarian law are incorporated in the disciplinary rules of the armed forces, the greater the impact of disciplinary sanctions. Their impact must then also be measured in terms of the accountability of an immediate superior who gives an order contrary to international humanitarian law or who does not ensure compliance with this body of law: the armed forces are founded on a strong principle of obedience to one's superior, meaning that responsibility for compliance with international humanitarian law lies essentially with him. The discussion that follows is divided into two parts and is intended to be both humble – an article can only lay the groundwork of a study that deserves to be carried out in far greater depth – and circumspect: an exhaustive study would be impossible, given the difficulties of gathering information on national military disciplinary systems, the author's linguistic shortcomings and the complexity of a comparative analysis of these systems.¹

Military disciplinary sanctions can be used to ensure compliance with international humanitarian law where there is an overlap between this body of law and disciplinary law

A comparison between a number of disciplinary systems² revealed rules common to these systems and to international humanitarian law, which enables us to try and determine the common ground between domestic and international rules. This is where disciplinary sanctions are likely to have an impact on compliance with international humanitarian law.

1 The military disciplinary systems and the criminal law of the following states were reviewed: Argentina, Australia, Bosnia and Herzegovina, Canada, Chile, France, Germany, Kenya, Philippines, Singapore, South Africa, Sri Lanka, Switzerland, Ukraine, United Kingdom, United States, Yugoslavia (before its break-up) and Zambia. The author would like to thank Stéphane Bourgon for providing documentation.

2 See note 1.

An attempt to establish the common ground between domestic disciplinary law and international humanitarian law

By studying a number of different military disciplinary systems we have been able to identify the categories of sanctions that are common to these two bodies of law. Given their widespread implementation, they appear to be the key sanctions used for maintaining discipline. Our consideration of the impact of disciplinary sanctions on compliance with international humanitarian law therefore focuses on these categories. It is clear that sanctions must be based on rules that are themselves inspired by international humanitarian law if they are to contribute to compliance with it.

The first category of common sanction identified concerns dereliction of duty and responsibilities by military personnel in combat.³

This category, which reinforces a soldier's principal duty, that of obedience, generally leads to compliance with international humanitarian law provided that military orders and assignments themselves comply with this body of law. The second category of sanction, which punishes orders to carry out a manifestly unlawful act and tolerance of such an act on the part of the superior,⁴ therefore complements the duty to "respect and ensure respect for" international humanitarian law contained in Article 1 common to the Geneva Conventions of 1949.⁵

We note that a soldier's duty to obey is sometimes constrained by a duty to disobey manifestly illegal orders⁶ – whether expressly, if disciplinary law prohibits compliance with such an order, or implicitly, if the refusal to obey is subject to disciplinary measures and concerns a legal order.⁷

This kind of disciplinary provision, whilst being difficult to implement,⁸ tends to favour compliance with international humanitarian law on the part of

3 For example: Germany, Law on the Legal Status of Soldiers (Soldiers' Law), Article 11; Australia, Defence Force Discipline Act 1982, Articles 15F and 27; Bosnia and Herzegovina, Rules on military discipline, Official Gazette of BiH, 13 August 1992, Article 7(1); Ceylon, Army Act, 1956, Article 98; Kenya, The Armed Forces (Summary Jurisdiction) Regulations, Articles 19, 28 and 30; Singapore, Singapore Armed Forces Act, Articles 17 and 21.

4 For example: Bosnia and Herzegovina, Decree Law on Service in the Army of the Republic of Bosnia and Herzegovina, Official Gazette of BiH, 1 August 1992, Article 41; France, Instruction (directive) No. 200690/DEF/SGA/DFP/FM/1, 30 May 2006.

5 Article 1 common to the four Geneva Conventions reads as follows: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."

6 For example: Germany, Law on the Legal Status of Soldiers (Soldiers' Law), Article 11; Bosnia-Herzegovina, Rules on military discipline, Official Gazette of BiH, 13 August 1992, Article 41; France, Instruction No. 201710/DEF/SGA/DFP/FM d'application du décret relatif à la discipline générale militaire (directive No. 201710/DEF/SGA/DFP/FM on the application of the decree on general military discipline), 4 November 2005, Article 7, and Statut général des militaires (general statute for soldiers), Articles 8 and 122-4.

7 For example: Australia, Defence Force Discipline Act 1982, Article 27; Kenya, The Armed Forces (Summary Jurisdiction) Regulations, Article 28; Singapore, Singapore Armed Forces Act, Article 17.

8 Regarding this issue see Jacques Verhaegen, "Refusal to obey orders of an obviously criminal nature: providing for a procedure available to subordinates", *International Review of the Red Cross*, No. 845 (March 2002), pp. 35-50.

military personnel because the soldier giving the order and the soldier carrying it out are both responsible for implementing this body of law.

The third category of common sanction identified covers ill-treatment of a person under supervision or outrages upon the dignity of such a person.⁹ This kind of sanction strengthens the rules of international humanitarian law prohibiting torture, cruel, inhuman or degrading treatment, sexual violence and outrages upon personal dignity.¹⁰ It in fact constitutes the essence of the protection offered to those who are not or are no longer participating in hostilities.

The final category of common sanction examined concerns harm to the reputation of the army.¹¹ We may legitimately consider that military personnel who violate fundamental rules of international humanitarian law bring discredit on the army to which they belong, as it is clearly utterly indefensible to use force in such a way as to violate the “cardinal principles” of international humanitarian law.¹² This generic category is therefore an interesting means of encouraging compliance with international humanitarian law, or at least its fundamental rules.

The question is therefore whether military disciplinary law plays a role in ensuring compliance with other rules of international humanitarian law, in cases where the violation is not considered to be a serious breach. According to Article 86(1) of Protocol I additional to the Geneva Conventions of 1949 (Additional Protocol I),

The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

Disciplinary sanctions can therefore be used to suppress or even repress violations that do not constitute grave breaches of international humanitarian law.¹³ The categories of common disciplinary sanction described above confirm beyond doubt that disciplinary sanctions can be used in these cases, provided that the orders given comply with international humanitarian law.

Disciplinary law can therefore cover all obligations under international humanitarian law, although its actual scope depends on the willingness of each state party to the Geneva Conventions of 1949 and their additional protocols.

9 For example: Bosnia-Herzegovina, Rules on military discipline, Official Gazette of BiH, 13 August 1992, Articles 7(6) and 7(9); Ceylon, Army Act, 1956, Article 126; Singapore, Singapore Armed Forces Act, Article 28.

10 See in particular Article 3 common to the Geneva Conventions of 1949. These disciplinary sanctions reinforce the repression of such violations contained in the statutes of the ICTY, the ICTR and the International Criminal Court.

11 For Bosnia and Herzegovina, Rules on military discipline, Official Gazette of BiH, 13 August 1992, Article 8(5); for Ceylon, Army Act, 1956, Article 107.

12 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, paras. 78–79.

13 According to the commentary on Article 86(1) of Protocol I additional to the Geneva Conventions, states are obliged to take the “measures necessary” to suppress any violations that do not constitute grave breaches under the Conventions or the Protocol. Disciplinary sanctions are merely one option; a state can equally choose to prosecute these violations under its domestic law.

Given the impact of military disciplinary sanctions on weapon bearers, we would argue for the greatest possible complementarity between military disciplinary law and international humanitarian law.

The effects of military disciplinary sanctions

Sanctions have a dual aim – education and dissuasion. The educative side consists of encouraging the soldier to discharge his responsibilities better and to respect the rules inherent in being a member of the armed forces. This being so, the sanction must be limited to what is necessary to ensure that the soldier understands that he has done something wrong and that he modifies his behaviour.¹⁴

The sanction is also a call to order for the soldier concerned. Although it concerns one particular soldier, it can serve as a warning to all personnel under the orders of the authority imposing it. To achieve this aim, the punishment must be just, but sufficiently severe. The disciplinary procedure must also be implemented quickly.

Military disciplinary sanctions make a clear contribution to compliance with international humanitarian law through education and dissuasion. They are likely to have a greater impact if the rights of the person being punished are respected when disciplinary sanctions are imposed. In other words, if the soldier concerned has access to his file, if he has the right to give an explanation regarding the facts cited against him, if his punishment has a legal and factual basis and if he has the right to appeal against the punishment promulgated, then disciplinary law is being applied in an educational and just manner, which can only strengthen the rules of international humanitarian law that underpin it.¹⁵ Setting up a disciplinary procedure that meets the standards for a fair trial appears to be even more imperative since, in the case of multinational military operations led by the United Nations for the purposes of peacekeeping and international security, sanctions are a matter for the states providing contingents.¹⁶

Depending on the scope of military disciplinary law in each state, the impact on compliance with international humanitarian law may be considerable.

14 In some bodies of disciplinary law the detaining authority is directed to ensure that the punishment fits the circumstances and will have the desired effect on the individual being punished. In French law, for example, the *Guide à l'usage des autorités investies du pouvoir disciplinaire* specifies that the more serious the soldier's efforts to mend his ways, the more lenient his punishment should be. It adds that warnings and suspended sentences should be used and that, conversely, any further misconduct or breach of duty should restrict the use of suspended sentences (*Guide à l'usage des autorités investies du pouvoir disciplinaire*, annex to Instruction (directive) No. 200690/DEF/SGA/DFP/FM/1, 30 May 2006). Likewise, for Bosnia-Herzegovina, Rules on military discipline, Official Gazette of BiH, 13 August 1992, Article 38.

15 The requirement for a fair trial is even more relevant, since it coincides with the recommendations of the UN Sub-Commission on the Promotion and Protection of Human Rights contained in UN Doc. E/CN.4/2006/58 of 13 January 2006. For a comprehensive discussion of the diversity of national military jurisdictions, with significant consideration of the implementation of disciplinary sanctions, see Elisabeth Lambert Abdelgawad (ed.), *Juridictions militaires et Tribunaux militaires d'exception en mutation: Perspectives comparées et internationales*, Editions des archives contemporaines, Paris, 2008.

16 UN Department of Peacekeeping Operations, Directives for Disciplinary Matters Involving Military Members of National Contingents, DPKO/MD/03/00993.

However, this depends first and foremost on the immediate superior, who is responsible for its implementation.

The duty of commanders to impose sanctions for violations as a precondition for compliance with international humanitarian law

Commanders must exercise disciplinary authority in order to maintain discipline and to enable the prosecution of serious breaches of international humanitarian law committed during hostilities. Moreover, international criminal judges consider that a commander has a duty to exercise this authority; if he does not, he is accountable for any breaches that occur.

The need to exercise disciplinary authority to ensure compliance with international humanitarian law

Disciplinary sanctions lose their educational and dissuasive effect if the sanctioning authority does not take action in the event of violations. Disciplinary sanctions are necessary for maintaining military discipline and for maintaining the commander's authority.¹⁷ It is precisely the hierarchical and disciplined structure of a military body that makes compliance with international humanitarian law possible for its members.¹⁸ Disciplinary sanctions are therefore a significant factor influencing compliance with international humanitarian law.

Disciplinary sanctions are also crucial to the prosecution of grave breaches of international humanitarian law committed during hostilities: as the judge is rarely at the scene of the hostilities, disciplinary sanctions play an important role in bringing to light the fact that a violation of international humanitarian law has taken place. Such violations might never have come to the judge's attention had they not been condemned as violations.

Disciplinary sanctions are therefore a decisive stage in the criminal punishment of grave breaches, which explains why international judges tend to consider that disciplinary sanctions are the minimum duty of an immediate superior when faced with this kind of violation. The International Criminal Tribunal for Rwanda considered that "in the case of failure to punish, a superior's responsibility may arise from his or her failure to create or sustain among the persons under his or her control, an environment of discipline and respect for the law".¹⁹ Here again, disciplinary sanctions are an essential tool in ensuring compliance with international humanitarian law. It is therefore logical that a

17 Moreover, the majority of domestic disciplinary systems provide that a commander has not only the right but also the duty to impose sanctions for offences or breaches committed by his subordinates. In French law, for example, we find Article 2 of Decree No. 2005-794 of 15 July 2005 regarding disciplinary sanctions and suspension as they apply to military personnel.

18 The relationship between organization and compliance with international humanitarian law is emphasized in Protocol II additional to the Geneva Conventions of 1949, Article 1.

19 *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgement, 7 June 2001, para. 50.

commander be held responsible if he does not punish breaches of international humanitarian law committed by his subordinates.

Accountability in international jurisprudence of a commander who does not use his authority to impose disciplinary sanctions

Article 87 of Additional Protocol I requires states to impose certain duties on commanders, such as that contained in paragraph 3, to “initiate disciplinary or penal action” against subordinates or other persons under their control who have breached the Geneva Conventions or the Protocol.²⁰ This duty is confirmed by case law from the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR).²¹

A commander who fails to impose disciplinary sanctions may be held responsible. Article 86 of Additional Protocol I provides that the immediate superior is to be held responsible should he not have taken all feasible measures to prevent or repress breaches committed by his subordinates.²² The international criminal tribunals make use of this accountability²³ and this has led to prosecutions.²⁴ Among them, it is worth highlighting the judgment in the *Hadžihasanović* case, in which the ICTY prosecuted a commander who had merely imposed a disciplinary measure when they believed that the seriousness of the conduct in question justified treatment by the competent legal authorities.²⁵ The implication here is that the immediate superior, as the person authorized to impose disciplinary sanctions, has a responsibility to encourage compliance with international humanitarian law.

This section of the judgment, regarding cruel treatment, was not contested by the parties. Nevertheless, the Appeals Chamber dismissed the prosecution’s argument that the trial chamber erred in law by concluding that the

20 Article 87(3) states that “The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.”

21 See *Prosecutor v. Hadžihasanović*, IT-01-47-T, Judgement, 15 March 2006, para. 176; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Judgement, 26 February 2001, para. 441; *Prosecutor v. Strugar*, IT-01-42-T, Judgement, 31 January 2005, para. 377 and *Prosecutor v. Blaskić*, IT-95-14-A, 29 July 2004, para. 83, based on Article 87(3) of Additional Protocol I and Article 7(3) of the Statute of the ICTY.

22 Article 86(2) of Additional Protocol I: “The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.”

23 *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgement, 07 June 2001, para. 50; *Prosecutor v. Hadžihasanović*, IT-01-47-T, Judgement, 15.03.2006, para. 171; and *Prosecutor v. Strugar*, IT-01-42-T, Judgement, 31 January 2005, para. 374.

24 *Prosecutor v. Strugar*, IT-01-42-T, Judgement, 31 January 2005, para. 463; *Prosecutor v. Hadžihasanović*, Judgement, 15 March 2006, para. 1777; and *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 03 March 2000, para. 734.

25 *Prosecutor v. Hadžihasanović*, IT-01-47-T, Judgement, 15 March 2006, para. 1777.

use of disciplinary sanctions is sufficient to discharge a superior of his duty to punish the crimes of pillage committed by his subordinates.²⁶ Indeed, it affirmed that

the assessment of whether a superior fulfilled his duty to prevent or punish under article 7(3) of the Statute has to be made on a case-by-case basis, so as to take into account the “circumstances surrounding each particular situation”.... It cannot be excluded that, in the circumstances of a case, the use of disciplinary measures will be sufficient to discharge a superior of his duty to punish crimes under article 7(3) of the Statute. In other words, whether measures taken were solely of a disciplinary nature, criminal or a combination of both, cannot in itself be determinative of whether a superior discharged his duty to prevent or punish under article 7(3) of the Statute.²⁷

As a result, it can be said that, when his subordinates committed violations of international humanitarian law of a certain gravity,²⁸ a commander cannot merely impose disciplinary sanctions but must also refer the matter to the competent court under domestic law.

This jurisprudence considerably strengthens the link between criminal and disciplinary sanctions. It is hence a powerful incentive for states to extend the duties and accountability that their respective legal systems impose on persons with disciplinary authority. It also confirms that disciplinary sanctions have an impact on compliance with international humanitarian law by actively employing the authority of sanctions in the service of this body of law.

26 *Prosecutor v. Hadžihasanović*, IT-01-47-A, Appeal Judgement, 22 April 2008, para. 33.

27 *Ibid.* (footnotes omitted).

28 In the case in point, the commander of the 3rd corps of the army of Bosnia and Herzegovina was found guilty in the trial chamber, in his capacity as a commander, of failing to take the necessary and reasonable measures to prevent a murder, punish another murder and prevent and/or punish cruel treatment.