

IHL: The Basics of Human Rights

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Abstract

International Humanitarian Law as a concept came into picture with the aim of seeking to limit the damage caused through armed conflicts and providing the means regulating the conduct during war.

The most important fact relating to International Humanitarian Law is that it cannot be suspended like other Human Rights by the State in times of crisis except under the exceptions specified in Article 5 of Fourth Geneva Convention.

IHL is based on the Geneva and Hague Conventions, Additional Protocols and a series of treaties governing means and methods of waging war such as those banning blinding laser weapons, landmines and chemical and biological weapons, as well as customary law.

International Humanitarian issues a classification for Armed Conflicts defined as either:

1. International Armed Conflict(IAC) – Common Article 2 of Geneva Convention 1949
"In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance".
2. Non International Armed Conflict (NIAC) – Common Article 3 of Geneva Convention 1949 "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties".

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Basic Principles of IHL

1. Firstly members who are not taking part in action or who longer take part in action must be dealt with respect and dignity. Their safety and security must be ensured at all times.
2. Secondly members of International Volunteering Groups like Red Cross, Red Crescent and so on providing medical assistance to the needy must be allowed Right to Safe Passage.
3. Also guidelines are laid down under the IHL which prohibits the members of the armed forces to the conflict from indulging in military excesses and using weapons of mass destruction leading to unnecessary damage.
4. The forces to conflict must always ensure minimal civilian casualty by ensuring they properly distinguish between military and non-military population.

International Humanitarian Law is based on the Principal of Proportionality and Necessity. Many Regional Humanitarian Laws across different parts of the world have been devised on the principals of International Humanitarian Law with the aim of devising strategies to minimize losses during conflicts and ensuring Natural Rights are not violated of the citizens during the conflicts.

International humanitarian law (IHL) regulates relations between States, international organizations and other subjects of international law. IHL is a set of rules that seek to limit the humanitarian consequences of armed conflicts. This also means that IHL is equally binding on all parties to an armed conflict, irrespective of their motivations or of the nature or origin of the conflict.

Humanitarian law and Human Rights

Humanitarian law, for its part, was primarily based on the reciprocal expectations of two parties at war and notions of chivalrous and civilized behavior. It did not emanate from a struggle of rights-claimants, but from a principle of charity—"inter arma caritas." And while human rights were an internal affair of states, humanitarian law, by its very nature, took its roots in the relation between states, in international law.

Situations of armed conflict deeply affect the enjoyment of economic, social, and cultural rights, especially because of security concerns which can severely disrupt functioning institutions, lead to shortages, and restrict mobility and thus access to work, land, health care, education, and food and water.

Sources of International Humanitarian Law

IHL can be found in three distinct sources: treaties, custom, and the general principles of law. In addition, case-law, doctrine and, in practice, “soft law” plays an important role.

Treaty Law

Treaty Law in IHL is applicable in non-international armed conflicts is significantly less developed, the most important sources being common Article 3 and, in certain circumstances, Additional Protocol II.

Custom

While treaty law is the most tangible source of IHL, its rules and principles are often rooted in custom, namely general State practice (usus) accepted as law (opiniojuris).

General Principles of Law

The third source of international law, next to treaties and custom, consists of “the general principles of law recognized by civilized nations.” Moreover, the ICTY has argued that “elementary considerations of humanity” are “illustrative of a general principle of international law” and “should be fully used when interpreting and applying loose international rules” of treaty law.³

Soft Law

While treaties, custom and general principles of law are the only sources of international law, the rules and principles derived from these sources often require more detailed interpretation before they can be applied in practice. Examples of such “soft law” instruments relevant for the interpretation of IHL include the United Nations Guiding Principles on Internal Displacement (1998) and the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

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³ICTY, The Prosecutor v. Kupreskic et al., Case No. IT-95-16-T-14, Judgment (Trial Chamber), January 2000, para. 524.

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Where the infliction of incidental harm on civilians or civilian objects cannot be avoided, it is subject to the principle of proportionality. Accordingly, those who plan or decide on an attack must refrain from launching, or must suspend, “any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

Relation of UN and IHL

Firstly, when we talk about International Humanitarian Law we must understand that the Charter does not mention about International Humanitarian Law explicitly anywhere.

The next issue, which we must be addressed before talking about the relation of UN and Humanitarian Law, is whether and to what extent and how can the UN deal with Humanitarian issues arising out of an Armed Conflict? The answer to this question lies in – Article I of the Charter entrusts the United Nations *inter alia* with maintaining international peace and security, and empowers the Security Council to take necessary action to maintain and to restore peace [1] In carrying out this duty the Security Council must act "in accordance with the Purposes and Principles of the United Nations." [2] Article I of the Charter, like Article 55, enjoins the UN "to promote and encourage respect for human rights and for fundamental freedoms for all.

However, in an effort to stem violent conflict, the United Nations has increasingly turned to peacekeeping and peace enforcement operations.

A UN panel, convened in 2000 by the Secretary-General to examine peace operations in the United Nations context, used the term “peace operations” as an umbrella term covering “conflict prevention and peacemaking; peacekeeping; and peace-building.”

The involvement of the UN in the field of international humanitarian law has developed strongly since the establishment of the organization, especially in the last few decades. One aspect is the increasing recognition that in certain situations forces under the command and control of the UN are bound by obligations under international humanitarian law. This recognition in principle has, however, not resolved a number of questions concerning the practical application of such obligations. As long as the UN and States remain reluctant in

concrete situations to recognize that a UN force is a party to an armed conflict, this is unlikely to change.

Various organs of the UN, notably the UN Security Council, the UN General Assembly, and the Human Rights Council concern themselves with ensuring compliance by States and armed groups with international humanitarian law. This role is reflected, inter alia, in Art. 89 Protocol I, which provides that in situations of serious violations of the Geneva Conventions or of Protocol I, the High contracting parties undertake to act, jointly or individually, in cooperation with the UN and in conformity with the United Nations Charter. The UN Security Council notably has taken far-reaching measures in this field under Chapter VII UN Charter, in particular through the establishment of the ICTY and the ICTR. These tribunals in turn have given an important impetus to the further clarification and development of substantive international humanitarian law. The efforts by the UNSC in ensuring compliance with or punishment of breaches of international humanitarian law have in the past been uneven. Whereas it took strong measures concerning one conflict, widespread violations of international humanitarian law in other conflicts were neglected. While it appears that this situation has improved somewhat in recent years, this may be an inherent feature of a political organ like the Security Council of the UN.

Responsibility To Protect (R2P) and IHL

R2P was a concept conceived by the humanitarian intervention debate, and born from a desire to resolve important contradictions of humanitarian need on the one hand, and state sovereignty and the principle of non-interference on the other. As such it is often seen as synonymous with the concept of humanitarian intervention, which is when a State, or group of States, intervenes militarily – ostensibly for humanitarian reasons and the protection of vulnerable communities.

Ensuring Compliance to IHL

We must understand that IHL in itself is not a binding force therefore in order to ensure compliance we must look at it from a wide and diverse perspective which can range from simple techniques like disseminating knowledge based training amongst the masses to strengthening various domestic laws at different stages.

Improved compliance with international humanitarian law and human rights law will always remain a distant prospect in the absence of, and absent acceptance of the need for, systematic and consistent engagement with non-state armed groups. Whether engagement is sought with armed groups in Afghanistan, Colombia, the Democratic Republic of the Congo, the

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occupied Palestinian territories, Pakistan, Somalia, the Sudan, Uganda, Yemen or elsewhere, experience shows that lives can be saved by engaging armed groups in order to seek compliance with international humanitarian law in their combat operations and general conduct, gain safe access for humanitarian purposes and dissuade them from using certain types of weapons.⁴

Under Article 1 common to the four Geneva Conventions, states undertake to “respect and ensure respect” for these conventions in all circumstances. The same provision is found in Article 1 of Additional Protocol I and, according to the International Court of Justice, the obligation to respect and ensure respect for IHL also applies in respect of obligations provided for in common Article 3 to the Geneva Conventions.⁵ Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of inter- national humanitarian law.

Let’s also have a look at an important political statement; the recently adopted Security Council resolution 2286 (2016) which does not consider the creation of new mechanisms. Instead, it simply calls upon the secretary-general to report on the issue, and to make recommendations on how to prevent attacks and ensure accountability and protection.

The term ‘non-state armed groups’ encompasses extremely different groups, most important for present purposes is their willingness to (attempt to) respect IHL, as this will determine the best approach for engaging with them. For those groups that show little inclination to do so, only the ‘hard’ end of the range of responses, such as criminal prosecution or sanctions, is likely to work.

Need to Resort to IHL

Sadly, there are countless examples of violation of international humanitarian law. Increasingly, the victims of war are civilians. However, there are important cases where international humanitarian law has made a difference in protecting civilians, prisoners, the sick and the wounded, and in restricting the use of barbaric weapons. Given that this body of law applies during times of extreme violence. That said, striving for effective compliance remains as urgent as ever.

IHL comprises a set of rules, established by treaty or custom, that seeks to protect persons and property/objects that are (or may be) affected by armed conflict and limits the rights of parties to a conflict to use methods and means of warfare of their choice".

⁴ Rep. of the UN Secretary-General on the Protection of Civilians in Armed Conflict, UN Security Council, UN doc. S/2010/579 at 11 (2010).

⁵ Nicaragua v. United States of America, Merits, ICJ Reports 1986, p. 14, para. 115.

International humanitarian law is applicable whenever a situation of violence reaches the level of armed conflict. The underlying causes of the armed conflict have no bearing on the application of IHL. However, alongside with a reexamination of established tenets of *ius ad bellum*, there seems also to be a questioning of the basic principle that whenever armed conflict does occur, it is governed by IHL (*ius in bello*). Invocation of the justness of the resort to armed force, particularly in the "war against terrorism", has not infrequently served as a justification for denying the applicability of the full range of international humanitarian law norms in situations where that body of rules was undoubtedly applicable.

Loopholes in IHL

However, from the discussions that took place in the Diplomatic Conference, it can be established that, to come under the scope of action of common Article 3, an armed conflict "presupposes the existence of hostilities of a certain scale or duration, as they cannot be either isolated or sporadic acts."⁶ However, the scale or duration is not clearly defined or described. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, known as Additional Protocol II, was drafted in June 1977 and includes a much more definite notion of armed conflicts of a non-international nature. Another important difference is that the Article makes it imperative that the armed forces of the State in whose territory the conflict occurs have to participate in the hostilities, as opposed to common Article 3, in which two illegal groups may be engaging each other in combat.⁷

Conclusion

In our opinion when we talk about International Humanitarian Law, we believe it is necessary to look at it from a multi-dimensional perspective. Firstly, they provide us with a model code of procedures and conduct to be followed while dealing International Armed Conflicts and Non International Armed Conflicts in order to minimise damage and loss of innocent lives. Secondly, they also provide a set of guidelines to be followed even with POW as well as with prevent use of excessive and unnecessary force.

It is pertinent to note that lot of International Action in Armed Conflicts in today's world is a major result of IHL. Geneva Convention and it's optional protocols have acted as a huge deterrent in controlling excessive use of force.

⁶EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS, 8 (2008).

⁷*Ibid* at 7.

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However, still some of the issues which are required to be addressed to ensure better compliance of IHL are issues like dealing with non-state actors, educating the masses about their rights and duties and so on. Thus, IHL is fundamental to the society and can by no means be limited by definitions and conventions ever in this constantly evolving world.