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ANALYSIS OF THE INTERNATIONAL HUMANITARIAN LAW

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ABSTRACT

The International Committee of the Red Cross dictates the Laws of War. Cumulative humanitarian spirit led to the first Geneva Convention of 1864. It encompassed basic limits of how war can be fought and who or what may be attacked and protected. It stated that civilians should not be attacked. Such an act would be declared as a war crime. Furthermore, civilians have a right to receive the help they need.

Moving on, detainees are protected from torture. They must be given food, water, allowed to communicate with loved ones. This protects their dignity.

Moreover, medical workers are to help the sick and wounded. The Red cross institute must not be attacked. All sick and wounded must be tended to.

Bringing into perspective, advances in weapons and technology have changed the rules of war. Autonomous robots may fight wars in the future. All weapons should and must be aligned with the rules of law.

The International Humanitarian Law (IHL) assists in preserving dignity during times of war.

Through this article, we will dive deep into the subject of IHL and analyse its relevance in today's world.

The basic conclusion, one will come to, after reading the article would be that although flawed in several manners, variables and factors both known and unknown to this subject, the IHL if followed judiciously and treated with respect is effective in times of war.

INTRODUCTION

International Humanitarian Law, also known as the law armed conflict or jus in bello or simply IHL is a specialized field of public international law which primarily regulates the conduct of parties engaged in an armed conflict.

IHL seeks to limit the consequences of armed conflict and aims to protect individuals, whether they're civilian or military and whether wounded or active.

To mitigate the effects of war, belligerent states and other armed groups engaged in the conflict are obliged to conduct hostilities within certain legal boundaries.

IHL ultimately seeks to strike a balance between two main underlying principles, the principle of humanity and the principle of military necessity.

-The principle of military necessity permits the use of force that is necessary to achieve the aim of a conflict, but with limits to the expenditure of life and resources.

-The principle of humanity forbids the infliction of suffering,
injury or destruction which would be unnecessary to win the war.

These two principles shape the entire body of law and are inherent in
most of the more detailed rules stemming from the Geneva Conventions or the Hague regulations.

On the basis of the fundamental idea that military necessity needs to be balanced with humanitarian considerations, a few operational principles follow that must be applied by armed groups on the battlefield.
These principles include those of:
1. distinction,
2. proportionality,
3. precautions and the
4. prohibition of unnecessary suffering.

What areas does IHL cover?

Generally speaking, IHL covers two areas or branches known as Hague law and Geneva law.

Hague law restricts the means and methods of warfare.
According to these rules, there are certain limitations upon the weapons that can be used in armed conflict, and hostilities can only be conducted in limited ways.
This area is also referred to as the law governing the conduct of hostilities.

Geneva law protects persons in armed conflict, such as military personnel and civilians who are not or who are no longer directly participating in hostilities.
This branch of IHL dictates that fighters who have laid down their arms, medical personnel, detainees, civilians and women and children should always be treated humanely and stipulates certain standards on how to treat them.
This area is also referred to as the law governing protected persons.

These two branches of IHL draw their names from the cities where the respective treaties were initially codified, the Hague and Geneva.

Hague law refers to the Hague Convention of 1899 and 1907 and the laws on the protection of certain individuals were laid down in the four 1949 Geneva Conventions.

A substantial part of IHL has been codified in the revised 1949 Geneva Conventions. Nearly every state in the world has signed and ratified these conventions. They have become one of the most widely accepted international treaty bodies in the world.

Both the Hague regulations and the Geneva Conventions have been developed and supplemented by the Additional Protocols of 1977, relating to the protection of victims of armed conflicts.

The protocols aimed to combine these two branches of IHL, and as a consequence, the distinction between Hague law and Geneva law has since become less relevant.

In addition to these key sources of IHL, there are other agreements which explicitly prohibit the use of certain weapons and military tactics, such as the 1980 Convention on Certain Conventional Weapons and its five protocols.

Many provisions of IHL are now accepted as customary law which means that they bind all states, regardless of whether these states have rectified their respective treaties.

BRIEF HISTORY OF IHL

From ancient battlefields to industrialized war

War is as old as mankind, and all civilizations and religions have tried to limit its devastating effects by subjecting warriors to customary practices, codes of honour and local or temporary agreements with the adversary. These traditional forms of regulating warfare became largely ineffective with the rise of con- scripted mass armies and the industrialized production of powerful weapons in the course of the nineteenth century – with tragic consequences on the battle- field. Military medical services were not equipped to cope with the massive number of casualties caused by modern weaponry; as a result, tens of thousands of wounded, sick and dying soldiers were left unattended after battle. This trend, which began with the Napoleonic Wars in Europe (1803–1815) and culminated in the American Civil War (1861–1865), set the stage for a number of influential humanitarian initiatives, both in Europe and in North America, aimed at alleviating the suffering of war victims and driving the systematic codification of modern IHL.

Humanitarian initiatives and first codifications

In Europe, the move towards codification of IHL was initiated by a businessman from Geneva, Henry Dunant. On a journey through northern Italy in 1859, Dunant witnessed a fierce battle between French and Austrian troops and, appalled at the lack of assistance and protection for more than 40,000 wounded soldiers, improvised medical assistance with the aid of the local population. After returning to Geneva, Dunant wrote *Un souvenir de Solferino* (*A Memory of Solferino*), in which he made essentially two proposals. First, independent relief organizations should be established to provide care to wounded soldiers on the battlefield and, second, an international agreement should be reached to grant such organizations the protection of neutrality. His ideas were well received in the capitals of Europe and led to the founding of the International Committee of the Red Cross (1863) and to the adoption by 12 States of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864). The Convention adopted the emblem of the red cross on a white background – the colours of the Swiss national flag inverted – as a neutral protective sign for hospitals and those assisting the wounded and sick on the battlefield. A parallel development was triggered by the atrocities of the American Civil War and led to the adoption by the government of the United States of the so-called Lieber Code or, more accurately, the Instructions for the Government of Armies of the United States in the Field (1863). Although the Lieber Code was a domestic instrument and not an international treaty, it has influenced the development and codification of modern IHL well beyond the borders of the United States.

Towards universal codification

Since the adoption of these first instruments, the body of treaty IHL has grown in tandem with developments in warfare to become one of the most densely codified branches of international law today.

In 1906, the original Geneva Convention was extended to further improve the condition of sick and wounded soldiers and, in 1907, the Hague Regulations concerning the Laws and Customs of War on Land formulated the

basic rules governing the entitlement to combatant privilege and prisoner-of-war status, the use of means and methods of warfare in the conduct of hostilities, and the protection of inhabitants of occupied territories from inhumane treatment. After the horrors of chemical warfare and the tragic experience of millions of captured soldiers during the Great War (World War I), these instruments were supplemented by the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925) and, a few years later, a separate Geneva Convention relative to the Treatment of Prisoners of War (1929).

After the cataclysm of World War II, which saw massive atrocities committed not only against wounded, captured and surrendering combatants but also against millions of civilians in occupied territories, the 1949 Diplomatic Conference adopted a revised and completed set of four Geneva Conventions: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), the Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) and the Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). The four Geneva Conventions of 1949 are still in force today and, with 196 States Parties, have become the most widely ratified treaties.

With the establishment of the United Nations and the consolidation of the bipolar world order of the Cold War, war no longer took place mainly between sovereign States (international armed conflicts), but between governments and organized armed groups (non-international armed conflicts). On the one hand, former colonial powers were increasingly confronted with popular demands for independence and self-determination, resulting in wars of national liberation – from the Malay Peninsula through the Middle East to the Maghreb and sub-Saharan Africa. On the other hand, policies of mutual nuclear deterrence entailed a military stalemate between the United States and the Soviet Union, which in turn resulted in a proliferation of non-international proxy wars between governments and organized armed groups, in which each side was supported by one of the superpowers.

So far, the only provision of treaty law applicable to non-international armed conflicts had been common Article 3, which essentially requires the protection and humane treatment of all persons who are not, or no longer, taking an active part in hostilities. It was only in 1977 that two protocols additional to the Geneva Conventions were adopted to further develop treaty IHL. Additional Protocol I, "relating to the Protection of Victims of International Armed Conflicts," not only improves and clarifies the protections already provided by the Geneva Conventions, it also contains the first systematic codification of IHL governing the conduct of hostilities. It also assimilates certain wars of national liberation against colonial domination, alien occupation and racist regimes to international armed conflicts, thus providing members of the insurgent forces the same rights and privileges as are enjoyed by combatants representing a sovereign State.

Additional Protocol II, "relating to the Protection of Victims of Non- International Armed Conflicts," strengthens and further develops the fundamental guarantees established by common Article 3 for situations of civil war.

At the same time, efforts to avoid unnecessary suffering among combat- ants and to minimize incidental harm to civilians have resulted in a range of international conventions and protocols prohibiting or restricting the development, stockpiling or use of various weapons, including chemical and biological weapons, incendiary weapons, blinding laser weapons, landmines and cluster munitions. Moreover, States are now obliged to conduct a review of the compatibility of any newly developed weapon with the rules and principles of IHL. Concurrently, State practice has resulted in a considerable body of customary IHL applicable in all armed conflicts, and the case-law of the Nuremberg and Tokyo Tribunals, the ICJ, the ad hoc Tribunals for the former Yugoslavia, Rwanda and Sierra Leone, and, most recently, the ICC has significantly con- tributed to the clarification and harmonious interpretation of both customary and treaty IHL.

Today, after 150 years of development, refinement and codification, the once fragmented and amorphous codes and practices of the past have emerged as a consolidated, universally binding body of international law regulating the conduct of hostilities and providing humanitarian protection to the victims of all armed conflicts. It is precisely at this point of relative maturity that the advent of the new millennium has posed fresh challenges to the fundamental achievements of IHL.

CORE PRINCIPLES OF IHL

1. Equality of belligerents and non-reciprocity

IHL is specifically designed to apply in situations of armed conflict. The belligerents therefore cannot justify failure to respect IHL by invoking the harsh nature of armed conflict; they must comply with their humanitarian obligations in all circumstances.[1] 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.[2] A State exercising its right to self-defence or rightfully trying to restore law and order within its territory must be as careful to comply with IHL as an aggressor State or a non-State armed group having resorted to force in violation of international or national law, respectively (equality of belligerents). Moreover, the belligerents must respect IHL even if it is violated by their adversary (non-reciprocity of humanitarian obligations).[3] Belligerent reprisals are permitted only under extremely strict conditions and may never be directed against persons or objects entitled to humanitarian protection.

3. Balancing military necessity and humanity

IHL is based on a balance between considerations of military necessity and of humanity. On the one hand, it recognizes that, in order to overcome an adversary in wartime, it may be militarily necessary to cause death, injury and destruction, and to impose more severe security measures than would be permissible in peacetime. On the

[1]GC I–IV, common Art. 1; CIHL, Rule 139.
[2]AP I, Preamble, para. 5.
[3]GC I–IV, common Art. 1; CIHL, Rule 140.

other hand, IHL also makes clear that military necessity does not give the belligerents carte blanche to wage unrestricted war.[4] Rather, considerations of humanity impose certain limits on the means and methods of warfare, and require that those who have fallen into enemy hands be treated humanely at all times. The balance between military necessity and humanity finds more specific expression in a number of core principles.

4. Distinction

The cornerstone of IHL is the principle of distinction. It is based on the recognition that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy,"[5] whereas "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations." Therefore, the parties to an armed conflict must "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

5. Precaution

The principle of distinction also entails a duty to avoid or, in any event, minimize the infliction of incidental death, injury and destruction on persons and objects protected against direct attack. Accordingly, IHL requires that, "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects." This applies both to the attacking party, which must do everything feasible to avoid inflicting incidental harm as a result of its operations (precautions in attack), and to the party being attacked, which, to the maximum extent feasible, must take all necessary measures to protect the civilian population under its control from the effects of attacks carried out by the enemy (precautions against the effects of attack).

6. Proportionality

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."[6]

7. Unnecessary suffering

IHL not only protects civilians from the effects of hostilities, it also prohibits or restricts means and methods of warfare that are considered to inflict unnecessary suffering or superfluous injury on combatants. As early as 1868, the St Petersburg Declaration recognized:

"That the only legitimate object during war is to weaken the military forces of the enemy;

[4]4 AP I, Art. 35(1); Hague Regulations, Art. 22. For further information, see Françoise Hampson, "Military necessity," in "Crimes of War," webpage, 2011. Available at: https:// web.archive.org/web/20130809183729/http://www.crimesofwar.org/a-z-guide/mili- tary-necessity/

[5]St. Petersburg Declaration, Preamble.

[6]AP I, Arts 51(5)(b) and 57(2)(a)(iii) and (b); CIHL, Rules 14, 18 and 19.

That for this purpose it is sufficient to disable the greatest possible number of men;
That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
That the employment of such arms would, therefore, be contrary to the laws of humanity."

Accordingly, in the conduct of hostilities, it is prohibited "to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

8. Humane treatment

One of the most fundamental rules of IHL is that all persons who have fallen into the power of the enemy are entitled to humane treatment regardless of their status and previous function or activities. Accordingly, common Article 3, which is considered to reflect a customary "minimum yardstick" for protection that is binding in any armed conflict, states: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." Although IHL expressly permits parties to the conflict to "take such measures of control and security in regard to [persons under their control] as may be necessary as a result of the war," the entitlement to humane treatment is absolute and applies not only to persons deprived of their liberty but also, more generally, to the inhabitants of territories under enemy control.

SOURCES OF IHL

Just like any other body of international law, IHL can be found in three distinct sources: treaties, custom, and the general principles of law.[7] In addition, case-law, doctrine and, in practice, "soft law" play an increasingly important role in the interpretation of individual rules of IHL.

1. Treaty law

Today, IHL is one of the most densely codified branches of international law. In practice, therefore, the most relevant sources of IHL are treaties applicable to the armed conflict in question. For example, in situations of international armed conflict, the most important sources of applicable IHL would be the four 1949 Geneva Conventions, their Additional Proto- col I, and weapons treaties, such as the 1980 Convention on Certain Conventional Weapons or the 2008 Convention on Cluster Munitions. Treaty IHL 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.[8] Given that most contemporary armed conflicts are non-international, there is a growing perception that certain areas of treaty IHL governing

[7] ICJ Statute, Art. 38(1).

[8] Other applicable treaties include the 1998 Rome Statute, the 1954 Hague Convention on Cultural Property and its Second Protocol of 1999, and a number of specific weapons treaties, namely the Convention on Certain Conventional Weapons of 10 October 1980 and its Article 1, as amended on 21 December 2001, the 1997 Anti-Personnel Mine Ban Convention, the 1993 Chemical Weapons Convention, and the 2008 Convention on Cluster Munitions.

these situations may require further strengthening, development or clarification.

The advantage of treaty IHL is that it is relatively unambiguous. The scope of applicability of the treaty is defined in the text itself, the respective rights and obligations are spelled out in carefully negotiated provisions, which may be supplemented with express reservations or understandings, and the States Parties are clearly identified through the act of ratification or accession. This does not preclude questions of interpretation from arising later, particularly as the political and military environment changes over time, but it provides a reliable basis for determining the rights and obligations of belligerents and for engaging in dialogue with them on their compliance with IHL.

2. 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 (opinio juris).[9] Such practice has consolidated into customary law, which exists alongside treaty law and independently of it. Customary law does not necessarily predate treaty law; it may also develop after the conclusion of a treaty or crystallize at the moment of its conclusion. For example, a belligerent State may have ratified neither the 1980 Convention on Certain Conventional Weapons nor Additional Protocol I, which prohibits the use of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." There is, however, a universally recognized customary prohibition against such means and methods of warfare.[10] Thus, that State would be prohibited from using such munitions under customary IHL.

The advantage of customary IHL is that it is a dynamic body of law constantly evolving in tandem with State practice and legal opinion. Customary law can therefore adapt much more quickly to new challenges and developments than treaty law, any change or development of which requires international negotiations followed by the formal adoption and ratification of an agreed text. Also, while treaties apply only to those States that have ratified them, customary IHL is binding on all parties to an armed conflict irrespective of their treaty obligations. Customary law is relevant not only where an existing IHL treaty has not been ratified by a State party to an international armed conflict; it is particularly relevant in situations of non-international armed conflict, because these are regulated by far fewer treaty rules than international armed conflicts, as explained above. The disadvantage of customary law is that it is not based on a written agreement and, consequently, that it is not easy to determine to what extent a particular rule has attained customary status. In reality, State practice tends to be examined and customs identified by national and international courts and tribunals tasked with the interpretation and adjudication of international law. The ICRC's extensive study on customary IHL is also a widely recognized source of reference in this respect.

The fact that customary law is not written does not mean that it is less binding than treaty law. The difference lies in the nature of the source, not in the binding force of the resulting obligations. For example, the International Military Tribunal at

[9] ICJ Statute, Art. 38(1)(b).

[10] CIHL, Rule 70.

Nuremberg, in the trials following World War II, held not only that the 1907 Hague Regulations themselves had attained customary nature and were binding on all States irrespective of ratification and reciprocity, but also that individuals could be held criminally responsible and punished for violating their provisions as a matter of customary international law. Similarly, the ICTY has based many of its judgments on rules and principles of IHL not spelled out in the treaty law applicable to the case at hand but considered to be binding as a matter of customary law.

3. 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."[11] There is no agreed definition or list of general principles of law. In essence, the term refers to legal principles that are recognized in all developed national legal systems, such as the duty to act in good faith, the right of self-preservation and the non-retroactivity of criminal law. General principles of law are difficult to identify with sufficient accuracy and therefore do not play a prominent role in the implementation of IHL. Once authoritatively identified, however, general principles of law can be of decisive importance because they give rise to independent international obligations.

Most notably, the ICJ has on several occasions derived IHL obligations directly from a general principle of law, namely "elementary considerations of humanity," which it held to be "even more exacting in peace than in war." Based on this principle, the ICJ has argued that the IHL obligation of States to give notice of maritime minefields in wartime applies in peacetime as well, and that the humanitarian principles expressed in common Article 3 are binding in any armed conflict, irrespective of its legal classification and of the treaty obligations of the parties to the conflict. 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.

In this context, it would be remiss not to refer to the Martens Clause, which provides that, in cases not regulated by treaty law, "populations and belligerents remain under the protection and empire of the principles of inter- national law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public con- science."[12] The Martens Clause was first adopted at the First Hague Peace Conference of 1899 and has since been reformulated and incorporated in numerous international instruments.[13] While the extent to which specific legal obligations can be derived directly from the Martens Clause remains a matter of controversy, the Clause certainly disproves assumptions suggesting that anything not expressly prohibited by IHL must necessarily be permitted.

[11] ICJ Statute, Art. 38.

[12] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 29 July 1899 (Hague Convention No. II), Preamble.

[13] Hague Regulations, Preamble; GC I, Art. 63; GC II, Art. 62; GC III, Art. 142; GC IV, Art. 158; AP I, Art. 1(2); AP II, Preamble; Convention on Certain Conventional Weapons, Preamble.

4. The role of "soft law," case-law and doctrine

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. For example, while the law makes clear that IHL applies only in situations of "armed conflict," the precise meaning of that term must be determined through legal interpretation. Similarly, IHL provides that civilians are entitled to protection from direct attack "unless and for such time as they take a direct part in hostilities." Again, a decision as to whether a particular civilian has lost his or her protection depends on the meaning of the term "direct participation in hostilities." Of course, guidance on the interpretation of IHL can be given by the States themselves as the legislators of international law. This may take the form of unilateral reservations or declarations, or resolutions of multilateral organizations, but also of support for non-binding instruments. 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).

Absent such State-driven guidance, the task of interpreting IHL falls, first and foremost, to international courts and tribunals mandated to adjudicate cases governed by IHL, such as the ad hoc international criminal tribunals established for specific conflicts, the ICC and, of course, the ICJ. In addition, the teachings of the most highly qualified publicists are also recognized as a subsidiary means of determining the law.[14] Also, in view of the special mandate of the ICRC, its Commentaries on the 1949 Geneva Conventions and their Additional Protocols are regarded as a particularly authoritative interpretation of these treaties.

IHL IN INTERNATIONAL LEGAL ORDER

IHL is that body of international law which governs situations of armed conflict. As such, it must be distinguished from other bodies of international law, particularly those that may apply at the same time as IHL, but which have a different object and purpose. The most important frameworks to be discussed in this context are: (1) the UN Charter and the prohibition against the use of inter-State force; (2) international human rights law; (3) international criminal law; and (4) the law of neutrality. It should be noted that, depending on the situation, other branches of international law, while not specifically discussed here, may be relevant as well. They include the law of the sea, the law governing diplomatic and consular relations, environmental law and refugee law, to name but a few.

1. IHL and the prohibition against the use of inter-State force

IHL governs situations of armed conflict once they arise. It does not regulate whether the use of force by one State against another is lawful in the first place. This function falls to the law governing the use of inter-State force, also referred to as jus ad bellum (or, perhaps more accurately, jus contra bellum),

[14] ICJ Statute, Art. 38.

the basic premises of which are set out in the UN Charter and corresponding customary law. Article 2(4) of the UN Charter provides that States "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." In essence, this amounts to a general prohibition on the use of force, or on the threat thereof, in international relations between States. Although irrelevant under IHL, the question of whether the prohibition against the use of inter-State force has been violated is an important part of the legal and political context of any armed conflict involving cross-border operations on the territory of another State.

The UN Charter stipulates only two exceptions to the prohibition against the use of inter-State force. First, Article 51 states that the prohibition does not impair a State's "inherent right of individual or collective self-defence if an armed attack occurs." In essence, this means that a State may lawfully resort to inter-State force in self-defence to the extent that this is necessary and proportionate to repel an armed attack. Second, Article 42 states that the Security Council may use, or authorize the use of, inter-State force "as may be necessary to maintain or restore international peace and security." It must be emphasized, however, that both exceptions derogate only from the Charter prohibition on the use of inter-State force, but cannot terminate, diminish or otherwise modify the absolute obligation of belligerents to comply with IHL (equality of belligerents).

2. IHL and human rights law

While IHL regulates the conduct of hostilities and the protection of persons in situations of armed conflict, international human rights law protects the individual from abusive or arbitrary exercise of power by State authorities. While there is considerable overlap between these bodies of law, there are also significant differences.

Scope of application: While the personal, material and territorial applicability of IHL essentially depends on the existence of a nexus with an armed conflict, the applicability of human rights protections depends on whether the individual concerned is within the "jurisdiction" of the State involved. For example, during an international armed conflict, IHL applies not only in the territories of the belligerent States, but essentially wherever their armed forces meet, including the territory of third States, international airspace, the high seas, and even cyberspace. According to the prevailing interpretation, human rights law applies only where individuals find themselves within territory controlled by a State, including occupied territories (territorial jurisdiction), or where a State exercises effective control, most commonly physical custody, over individuals outside its territorial jurisdiction (personal jurisdiction). More extensive interpretations of jurisdiction have been put forward that would extend human rights protections to any individual adversely affected by a State, but they remain controversial.

Scopes of protection and obligation: IHL is sometimes inaccurately described as the "human rights law of armed conflicts." Contrary to human rights law, IHL generally does not provide persons with rights they could enforce through individual complaints

procedures. Also, human rights law focuses specifically on human beings, whereas IHL also directly protects, for example, livestock, civilian objects, cultural property, the environment and the political order of occupied territories. Finally, human rights law is binding only on States, whereas IHL is binding on all parties to an armed conflict, including non-State armed groups.

Derogability: Most notably, IHL applies only in armed conflicts and is specifically designed for such situations. Therefore, unless expressly foreseen in the relevant treaty provisions, the rules and principles of IHL cannot be derogated from. For example, it would not be permissible to disregard the prohibition on attacks against the civilian population based on arguments such as military necessity, self-defence or distress. Human rights law, on the other hand, applies irrespective of whether there is an armed conflict. In times of public emergency, however, human rights law allows for derogations from protected rights to the extent actually required by the exigencies of the situation. For example, during an armed conflict or a natural disaster, a government may lawfully restrict freedom of movement in order to protect the population in the affected areas and to facilitate governmental action aimed at restoring public security and law and order. Only a number of core human rights, such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of slavery remain non-derogable even in times of public emergency.

Interrelation: Despite these fundamental differences, IHL and human rights law have rightly been said to share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity."[15] As a general rule, where IHL and human rights law apply simultaneously to the same situation, their respective provisions do not contradict, rather they mutually reinforce each other. Thus, both IHL and human rights law prohibit torture or inhuman and degrading treatment and afford fair-trial guarantees to anyone accused of a crime.

In some areas, the interrelation between IHL and human rights law may be less straightforward. For example, with respect to persons who do not, or no longer, directly participate in hostilities, IHL prohibits violence to life and person, in particular murder in all circumstances. For obvious reasons, however, it does not provide such protection to combatants and civilians directly participating in hostilities. Universal human rights law, on the other hand, protects all persons against "arbitrary" deprivation of life, thus suggesting that the same standards apply to everyone, irrespective of their status under IHL. In such cases, the respective provisions are generally reconciled through the lex specialis principle, which states that the law more specifically crafted to address the situation at hand (lex specialis) overrides a competing, more general law (lex generalis). Accordingly, the ICJ has held that, while the human rights prohibition on arbitrary deprivation of life also applies in hostilities, the test of what constitutes arbitrary deprivation of life in the context of hostilities is deter- mined by IHL, which is the lex specialis specifically designed to

[15] IACHR, Juan Carlos Abella v. Argentina (La Tablada case), Case No. 11.137, Report No. 55/97, 18 November 1997, para. 158. See also ICTY, Prosecutor v. Anto Furundzija (Trial Judgment), IT-95-17/1-T, 10 December 1998, para. 183.

regulate such situations.[16] Similarly, the question of whether the internment of a civilian or a prisoner of war by a State party to an international armed conflict amounts to arbitrary detention prohibited under human rights law must be determined based on the Third and Fourth Geneva Conventions, which constitute the lex specialis specifically designed to regulate internment in such situations.

In other areas, the question of the interrelation between IHL and human rights may be even more complicated. For example, while treaty IHL con- firms the existence of security internment in non-international armed conflicts as well, it does not contain any procedural guarantees for internees, thus raising the question as to how the human rights prohibition of arbitrary detention is to be interpreted in such situations.
Finally, even though, in armed conflicts, IHL and human rights law generally apply in parallel, some issues may also be exclusively governed by one or the other body of law. For example, the fair-trial guarantees of a person who has committed a common bank robbery in an area affected by an armed conflict, but for reasons unrelated to that conflict, will not be governed by IHL but exclusively by human rights law and national criminal procedures. On the other hand, the aerial bombardment of an area outside the territorial control of the attacking State, or any belligerent acts committed by organized armed groups not belonging to a State, will not be governed by human rights law but exclusively by IHL.

3. IHL and international criminal law

In regulating the conduct of hostilities and protecting the victims of armed conflict, IHL imposes certain duties on those involved in the conflict and prohibits them from engaging in certain acts. In order to enforce these duties and prohibitions, IHL obliges all parties to a conflict to take the measures necessary to prevent and repress violations of IHL, including criminal prosecution and sanctions. The 1949 Geneva Conventions and Additional Protocol I also identify a series of particularly serious violations, referred to as "grave breaches" and, in Additional Protocol I, as "war crimes," which give rise to universal jurisdiction. This means that any State, irrespective of its involvement in a conflict or its relation to the suspects or victims of an alleged crime, has an international obligation to conduct an investigation and to either prosecute the suspects or to extradite them to another State willing to prosecute them.

In short, IHL obliges States to prevent and prosecute serious violations of IHL, but it does not attach sanctions to these violations, does not describe them in sufficient detail to make them prosecutable in court, and does not establish any procedures for the exercise of jurisdiction over individual suspects. This is the role of criminal law, whether on the domestic or the international level. In other words, criminal law, in contrast to IHL, does not define the duties of the belligerents, but creates the legal basis needed to prosecute individuals for serious violations of these duties.

Traditionally, the enforcement of IHL at the level of the individual was largely ensured by

[16] ICJ, Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 8 July 1996, ICJ Reports 1996, para. 25.

the belligerent States themselves, through disciplinary sanctions and criminal prosecution under their national laws and regulations. It was at the end of World War II that serious violations of IHL were first considered to give rise to individual criminal responsibility as a matter of international law and were prosecuted as war crimes by the International Military Tribunals in Nuremberg and Tokyo. These trials remained tied to specific contexts, however, and prosecuted only crimes committed by the defeated parties to the conflict. When the UN Security Council established the ICTY and the ICTR in 1993 and 1994, respectively, their jurisdiction was still confined to particular contexts. It was only with the adoption of the Rome Statute, in 1998, that the international com- munity finally created a permanent International Criminal Court with jurisdiction over international crimes committed by nationals, or on the territory, of a State party to the Statute, or referred to it by the UN Security Council. Today, the Rome Statute has been ratified by more than 120 States; however, a number of militarily important States have yet to do so.

4. IHL and the law of neutrality

The law of neutrality is traditionally regarded as part of the law of war (jus in bello) alongside IHL. It is rooted in customary law and codified in the Hague Conventions, Nos V and XIII, of 1907. In essence, the law of neutrality has three aims: (a) to protect neutral States (i.e. all States that are not party to an international armed conflict) from belligerent action; (b) to ensure neutral States do not militarily support belligerent States; and (c) to maintain normal relations between neutral and belligerent States. Most notably, the law of neutrality obliges neutral States to prevent their territory, including airspace and waters subject to their territorial sovereignty, from being used by belligerent States. If combatants belonging to either party cross into neutral territory, they must be interned by the neutral State; the Third Geneva Convention also requires that they be treated as prisoners of war.[17] The belligerents, in turn, must respect the inviolability of neutral territory and may not move troops or convoys of ammunition or supplies across the territory of a neutral State.

Strictly speaking, the law of neutrality applies only in international armed conflicts. Over the course of time, however, its rationale has gradually found its way into the practice of non-international armed conflicts as well. For example, with regard to the standards of internment to be applied by neutral States to combatants on their territory, the ICRC has formally stated that Hague Convention No. V "can also be applied by analogy in situations of non-international conflict, in which fighters either from the government side or from armed opposition groups have fled into a neutral State."

By the same token, in political reality, the consequences of non-State armed groups using the territory of a neutral State to conduct attacks against a belligerent State are similar to those foreseen in the traditional law of neutrality and include, most notably, the loss of the neutral territory's inviolability. For example, when attacks were launched by al-Qaeda against the United States from within Afghanistan (2001), by Hezbollah against Israel (2006) from within Lebanon, and by the FARC against Colombia from within Ecuador (2008), all the States that had been attacked conducted cross-border

[17] Hague Regulations, Art. 11; GC III, Art. 4(B)(2).

incursions against the groups in question, because their neutral host States were unable or unwilling to protect the attacked States' interests within their territory. The international lawfulness of such cross-border incursions remains widely controversial, particularly in view of the UN Charter's prohibition on the use of inter-State force. However, the basic obligation of States to prevent non-State armed groups within their territory from engaging in hostile activities against other States is generally recognized.

CONCLUSION AND ANALYSIS

The legal and practical difficulties arising as a result of changes in the contemporary security environment have caused confusion and uncertainty not only about the distinction between armed conflict and law enforcement, but also about the traditional categorization of persons as civilians and combatants and the temporal and geographic delimitation of the "battlefield." As most poignantly evidenced by the controversies surrounding the legal framework governing the various aspects of the United States' "war on terror," that confusion and uncertainty have also provoked doubt about the adequacy of existing IHL to cope with the emerging security challenges of the twenty-first century. In response, various key stakeholders have launched important processes aimed at analysing, reaffirming and clarifying IHL in areas of particular humanitarian concern, including, most recently, the ICRC's initiative on strengthening legal protection for victims of armed conflicts and the joint initiative of Switzerland and the ICRC on strengthening mechanisms for the implementation of IHL. These processes remain ongoing, but preliminary observations can already be drawn from the preparatory work and initial discussions. There may indeed be certain areas of IHL that require further strengthening in order to better protect individuals exposed to contemporary armed conflicts. The most urgent humanitarian need, however, is not to adopt new rules but rather to ensure actual compliance with the existing legal framework.

BIBLIOGRAPHY

1. International Humanitarian Law by Nils Melzer; Coordinated by Etienne Kuster
2. https://www.coursera.org/learn/international-humanitarian-law/home/welcome
3. https://www.universiteitleiden.nl/en/education/study-programmes/summer-schools/international-humanitarian-law-in-theory-and-practice
4. https://www.icrc.org/en/doc/assets/files/other/icrc_002_0703.pdf
5. https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf

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