

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 6

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

International Humanitarian Law: An Overview

TOUSIF KHAN¹

ABSTRACT

This article delves into the subject of International Humanitarian Law, providing a comprehensive exploration of its evolution and historical development. The narrative meticulously traces the timeline associated with this legal framework, elucidating its pivotal role in addressing armed conflicts. Furthermore, the article expounds on the Principles Governing Means and Methods of Warfare within the realm of International Humanitarian Law. Subsequently, it examines the responsibilities entrusted to states under this legal framework, thereby offering a nuanced understanding of their obligations in the context of armed conflicts.

Keywords: *Evolution, Historical Development, Armed Conflicts, State Responsibilities, Humanitarian Principles, Armed Conflicts.*

I. INTRODUCTION

International Humanitarian Law is a set of rules governing armed conflicts, aiming to mitigate their impact for humanitarian reasons. It applies to both international and non-international armed conflicts, protecting civilians, combatants, and those no longer participating in hostilities. It is part of international law, drawing from treaties, conventions, customary rules, and general principles. The International Committee of the Red Cross (ICRC) plays a crucial role in promoting and safeguarding International Humanitarian Law. It seeks to balance military necessity and humanitarian considerations, allowing for war while setting limits to protect individuals. The convergence between International Humanitarian Law and International human rights law reflects their shared responsibility in safeguarding civilians' rights during armed conflicts. While International Humanitarian Law addresses armed conflict situations, it does not aim to prohibit war entirely but establishes realistic limits. International armed conflicts are presumed to exist based on factual armed force use between states, regardless of formal declarations. The concept of "armed conflict" has replaced the traditional notion of a formal state of war. It also defines the conduct and responsibilities of belligerent nations, neutral nations, and individuals engaged in warfare, binding states through treaties and customary rules.

¹ Author is a student at Indian Institute of Legal Studies, India.

II. EVOLUTION AND HISTORICAL DEVELOPMENT

(A) Early development

Throughout history, societies have sought to mitigate the destructive impact of war through evolving codes of conduct. Early civilizations saw brutal practices after victory, yet instances of caring for wounded soldiers and rules of engagement existed. Even in Papua, tribes adhered to rules such as warning enemies in advance and observing a truce for 15 days in case of severe injury or death. The Sumerians treated war as a legally governed state, commencing with a declaration and concluding with a peace treaty.² Various cultures, including Chinese, Japanese, Indian, and Arabic, have long-standing traditions of rules of warfare, not limited to Western concepts. Christopher Greenwood highlights the historical roots of laws of war, acknowledging that early military practices often diverged from theoretical principles. Ancient texts such as the Code of Hammurabi, Mahabharata, Bible, Koran, Japanese Code of Bushido, and Code of Manu reflect early codes of conduct. Examples, like the Hittite law requiring a declaration of war and envisioning peace treaties, and Cyrus I's decree in the 7th century BC to treat wounded enemies as one's own, illustrate the ancient foundations of international humanitarian law.

Ancient societies, including the Sumerians, Greeks, Romans, and others, had established rules of warfare reflected in texts like the Laws of Manu and the Mahabharata in India (circa 400 BC) and the Code of Hammurabi in Mesopotamia (1754 BC). These codes prohibited certain means of warfare, protected the weak, and outlined principles of precaution and proportionality. Islamic law emphasized sparing vulnerable individuals. Even in early, seemingly uncivilized societies like the Papuan tribes, there were customs governing warfare, showcasing the existence of a primitive form of international humanitarian law (IHL).

Grotius, reflecting on recent wars, emphasized the need for strict laws governing conflict. In the 19th century, industrialized weapon production led to devastating consequences on the battlefield, resulting in mass casualties and neglected wounded soldiers. This trend, starting with the Napoleonic Wars and peaking in the American Civil War, spurred humanitarian initiatives in Europe and North America, driving the systematic codification of modern International Humanitarian Law.³

Henry Dunant and Francis Lieber are pivotal figures in the development of modern International

² J.S. Pictet, *The Development and Principles of International Humanitarian Law*, Vol. 2 (Course given in July 1982 at the University of Strasbourg as part of the courses organised by the International Institute of Human Rights, Martinus Nijhoff Publishers 1985)

³ Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross 2016) 34.

Humanitarian Law, with their work directly influencing the concept and content of contemporary IHL.⁴ Dunant and Lieber, influenced by Rousseau's Social Contract, argue that war is a state-to-state conflict, where individuals are enemies only as soldiers, not as men or citizens. Rousseau's idea emphasizes sparing the lives of soldiers when they cease fighting, aligning with established principles and the practice of civilized societies throughout history.⁵

Rousseau articulated the fundamental principle of International Humanitarian Law: distinguishing between combatants and non-participating civilians. He argued that force is permissible only against enemy armed forces, not to annihilate a nation. Soldiers can be targeted only while resisting, and those who cease fighting or are unable to continue are no longer legitimate military targets.⁶

(B) Battle of Solferino

Henri Dunant, inspired by the Battle of Solferino in 1859, witnessed the suffering of the wounded and proposed international action to alleviate their plight. In 1862, he published "A Memory of Solferino" and suggested creating national societies to care for the sick and wounded during wartime. Dunant, with four friends, established the International Committee for Aid to the Wounded (later ICRC). His ideas gained government support, leading to the 1864 Geneva Convention, which aimed to improve the conditions for the wounded in armies during field operations.

(C) Lieber Code

In 1863, a year before the Geneva Diplomatic Conference of 1864, US President Abraham Lincoln commissioned Columbia University Professor Francis Lieber to create rules for the conduct of the Union army during the Civil War. The result was the Lieber Code, a set of 157 articles promulgated as General Order No. 100 in 1863. While not a treaty, it served as a code of conduct during war, codifying existing practices in North America and Europe. The Lieber Code significantly influenced later laws of war, serving as a basis for Hague and Geneva law. It contributed to the humanization of war, emphasizing the principle of military necessity to limit violence. Notably, it distinguished between the treatment of combatants and non-combatants and established conditions for the humane treatment of prisoners of war, advocating

⁴ H.P. Gasser, "International Humanitarian Law: An Introduction" in *Humanity for All: The International Red Cross and Red Crescent Movement* (Henry Dunant Institute, Haupt 1993) 7, available at <https://icrcndresourcecentre.org/wp-content/uploads/2016/03/EnglishTotal.pdf> :last accessed 20-11-2023.

⁵ D. Wootton (Ed.), *Modern Political Thought: Readings from Machiavelli to Nietzsche* (Hackett Publishing 1996).

⁶ H.P. Gasser, "International Humanitarian Law: An Introduction" in *Humanity for All: The International Red Cross and Red Crescent Movement* (Henry Dunant Institute, Haupt 1993) 7, available at <https://icrcndresourcecentre.org/wp-content/uploads/2016/03/EnglishTotal.pdf> :last accessed 20-11-2023.

equal treatment regardless of social, ethnic, or economic origins. The Lieber Code laid the groundwork for subsequent Conventions, Protocols, and Declarations related to armed conflicts.⁷

(D) The Geneva Convention of 1864

Henry Dunant, inspired by the Battle of Solferino, called for international legal protection for wounded soldiers. This led to the formation of a committee in Geneva, which, in 1864, established the "Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field." This marked the birth of modern International Humanitarian Law (IHL) with principles of universality and tolerance, and the adoption of the Red Cross emblem for medical personnel.⁸

(E) The Hague Conventions of 1899 and 1907

The Hague Conventions were international treaties established during the First and Second Peace Conferences in The Hague in 1899 and 1907. These conventions, alongside the Geneva Conventions, marked early efforts to codify laws of war and war crimes. The first conference occurred in May 1899, resulting in a treaty signed in July and effective from September 1900. The 1899 Convention comprised four main sections and three additional declarations, covering topics such as the pacific settlement of disputes, laws of war on land, maritime warfare principles, and prohibitions on certain weapons, including projectiles from balloons, asphyxiating gases, and expanding bullets.

(F) Martens Clause

The Martens Clause originated during the 1899 Hague Peace Conference to address disagreements on the status of resistance movements in occupied territories. It emphasizes the application of international law principles in cases not covered by specific regulations. Its interpretations range from a reminder of customary international law to a broader consideration of conduct during armed conflicts based on principles like the "law of humanity." The clause underscores the importance of customary norms and refers to "the principle of humanity" prohibiting unnecessary means and methods of war for military advantage.⁹

⁷ See, U.C. Jha and K. Ratnabali, *The Law of Armed Conflict* (Vij Books India Private Limited 2017).

⁸ Fact Sheet No. 13, International Humanitarian Law and Human Rights, available at <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet13en.pdf> :last accessed 20-11-2023.

⁹ R. Ticehurst, "The Martens Clause and the Laws of Armed Conflict" (1997) 37(317) *International Review of the Red Cross* Archive 125–134.

III. PRINCIPLES GOVERNING MEANS AND METHODS OF WARFARE

The principle of distinction, a cornerstone of International Humanitarian Law (IHL), prohibits the use of means and methods that fail to differentiate between individuals actively engaged in hostilities (combatants) and those who are not. Consequently, individuals falling into the latter category are afforded protection in accordance with the principle of distinction.¹⁰ International Humanitarian Law (IHL) expressly forbids the deployment of indiscriminate weapons, defined as armaments whose impacts cannot be constrained. Examples of such weapons encompass anti-personnel mines, cluster munitions, drifting armed contact mines, biological weapons, and long-range unguided missiles. However, it is important to note that a weapon's legality is not determined solely by the potential for incidental civilian casualties or collateral damage.

Furthermore, the principle of proportionality within IHL stipulates that even in the presence of a legitimate military target, an attack must be refrained if the risk of causing harm to civilians or civilian property outweighs the anticipated military advantage.¹¹

A military target is characterized as an entity that substantively contributes to a military operation. While the definition is straightforward, its application can be challenging, particularly in cases where an entity serves dual purposes for both civilian and military use. For instance, an airport may qualify as a legitimate military target if employed for the transportation of military goods; however, if its primary function is civilian in nature, it cannot be subject to targeting.¹²

One fundamental tenet of International Humanitarian Law (IHL) is the prohibition of causing unnecessary suffering. IHL expressly prohibits the deployment of weaponry that escalates suffering without commensurate military advantage. Anti-personnel weapons, specifically crafted to incapacitate or eliminate enemy combatants, are deemed lawful, irrespective of the resulting death, pain, or suffering they may cause. Conversely, laser weapons designed to induce permanent blindness, poisoned projectiles, and soft-nosed lead bullets (commonly known as dum-dum bullets) are proscribed due to their capacity to inflict gratuitous suffering. Likewise, the utilization of projectiles and bullets composed of materials impervious to X-ray detection is expressly forbidden under the provisions of IHL.¹³

¹⁰ Art. 48 of Additional Protocol I, 1977.

¹¹ Art. 22 of Hague Regulation IV.

¹² U.C. Jha, *International Humanitarian Law* (VIJ Books India Pvt. Ltd., New Delhi 2011) 90.

¹³ Under Art. 3(a) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, the employment of weapons calculated to cause unnecessary suffering is regarded as a violation of the laws and customs of war giving rise to individual criminal responsibility. Art. 8(2)(b)(xx) of the Rome Statute of the ICC states that "employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law or the

International Humanitarian Law (IHL) is often construed as being grounded in the delicate equilibrium between military necessity and humanity. The principle of military necessity is intricately linked to two other pivotal principles: unnecessary suffering and proportionality, as previously elucidated. The principle of military necessity serves to rationalize the imposition of only the requisite degree of suffering upon an adversary combatant, with the sole aim of compelling the enemy's submission. Notably, the Rome Statute of the International Criminal Court (ICC) delineates the framework for prosecuting transgressions related to military necessity. Specifically, Article 8(2)(a)(iv) and Article 8(2)(b)(xiii) of the Rome Statute stipulate that intentionally launching an attack with the knowledge that it will result in excessive death or damage, as well as the destruction or seizure of enemy property, constitutes a war crime.¹⁴ In conjunction with these principles, certain regulations have been correlated with the comportment of military personnel in armed conflict, emphasizing the requisite for equitable engagement and fostering a measure of mutual regard and confidence among opposing forces.

IV. STATE RESPONSIBILITIES UNDER INTERNATIONAL HUMANITARIAN LAW

International Humanitarian Law (IHL) encompasses a body of international treaties and customary rules designed to address humanitarian considerations arising directly from both international and non-international armed conflicts.¹⁵ The effective implementation of International Humanitarian Law (IHL) is primarily the responsibility of State parties to relevant instruments. States are obligated to ensure compliance with treaty provisions and to prosecute individuals who violate IHL rules. Both state and individual responsibilities under international law are delineated in various international instruments adopted by the global community over time.¹⁶

The primary responsibility for implementing International Humanitarian Law (IHL) rests with States, which are explicitly obligated to enact legal and practical measures to ensure comprehensive compliance with IHL. These measures are to be executed by various State entities, including the legislature, the judiciary, the armed forces, and other relevant agencies. Additionally, professional and educational bodies, as well as entities such as the National Red Cross or Red Crescent Society and other voluntary organizations, play a crucial role in this

armed conflict,” would be a war crime.

¹⁴ Definition of war crime includes: Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war.

¹⁵ ICRC, “Implementing International Humanitarian Law: From Law to Action”, Advisory Service on IHL, International Committee of the Red Cross, available at <https://blogs.icrc.org/> :last accessed 20-11-2023.

¹⁶ Treaties, States Parties, and Commentaries, available at <https://ihl-databases.icrc.org/en/ihl-treaties/treaties-and-states-parties> : last accessed 20-11-2023.

regard. Furthermore, at the international level, various measures have been instituted to address and respond to severe violations of IHL. An International Humanitarian Fact-Finding Commission¹⁷ has been set up and States parties are encouraged to use its services.¹⁸ International criminal tribunals and other specialized courts have been established to address grave violations occurring in distinct contexts of armed conflict. Nevertheless, it is imperative to underscore that States bear the primary responsibility for the complete implementation of International Humanitarian Law (IHL). In this regard, States are obligated to enact appropriate measures at the national level, including mechanisms to prosecute and mete out punishment to individuals found guilty of serious violations of IHL. The Four Geneva Conventions of 1949 and their Additional Protocols delineate a comprehensive set of actions that State parties to these international instruments must undertake. Among these, some of the most critical measures encompass the adoption of a broad range of measures to ensure compliance with IHL principles and norms are as follows:

1. To facilitate the dissemination of Conventions and their Additional Protocols, it is imperative to undertake the translation of these instruments into national language(s) and subsequently communicate the official translations, along with any pertinent laws and regulations enacted to ensure their effective implementation, to other high contracting parties.¹⁹
2. To disseminate awareness regarding the stipulations outlined in Conventions, their Additional Protocols, and corresponding domestic legislations, aiming for broad comprehension within both the armed forces and the general populace.²⁰
3. To ensure the effective enforcement of International Humanitarian Law (IHL) and address violations thereof, it is imperative to enact criminal legislation designed to prosecute individuals found culpable of perpetrating "grave breaches" of IHL, thereby

¹⁷ The International Humanitarian Fact-Finding Commission (IHFFC) was established under Additional Protocol I to the Geneva Conventions, 1949. It provides service to parties of armed conflict to conduct enquiries regarding alleged violations of IHL and through its good offices to facilitate the restoration of an attitude of respect for the law. In order to ensure guarantees afforded to the victims of armed conflicts, Additional Protocol I to the Geneva Conventions, 1949 provides for the establishment of an IHFFC. [Art. 90] The IHFFC was subsequently established in 1991. It is a permanent body consisting of 15 independent experts elected by States parties to Additional Protocol I. They all are required to act in their personal capacity. The Commission's essential purpose is to contribute to implement and ensure respect for IHL during armed conflict.

¹⁸ International Humanitarian Fact-Finding Commission, available at <https://www.ihffc.org/index.asp?Language=EN&page=home> : last accessed 20-11-2023.

¹⁹ Art. 48 of Geneva Convention (I); Art. 49 of Geneva Convention (II); Arts. 41 and 128 of Geneva Convention (III); Arts. 99 and 145 of Geneva Convention (IV); Art. 84 of AP I, 1977 of Geneva Convention 1949.

²⁰ Art. 47 of Geneva Convention (I); Art. 48 of Geneva Convention (II); Arts. 41 and 127 of Geneva Convention (III); Arts. 99 and 144 of Geneva Convention (IV); Arts. 80, 82–83, 87 of AP I, 1977; Art. 19 of AP II, 1977; Art. 7 of AP III, 2005.

constituting war crimes. These legislative measures should encompass comprehensive provisions for the prosecution of such offenses, including overarching principles.²¹ war crimes²² and compensation to victims.²³

4. To guarantee the proper identification, marking, and preservation of individuals, property, and designated locations protected under the law, to safeguard them from potential harm.²⁴
5. To mitigate the potential for the improper utilization of the emblems and symbols, including the Red Cross, Red Crescent, Red Crystal, and other insignias stipulated in the Conventions and their Additional Protocols, it is imperative to implement requisite measures.²⁵
6. To safeguard the entitlement of protected individuals to judicial and other fundamental guarantees amid armed conflict.
7. To effectively implement the Conventions and Protocols of International Humanitarian Law (IHL), it is imperative to appoint and train individuals proficient in IHL. This includes the facilitation of training programs to ensure the deployment of qualified legal advisers within armed forces, thereby enhancing the application and adherence to the stipulated legal frameworks.²⁶
8. To facilitate the establishment and governance of National Red Cross and Red Crescent Societies, as well as other voluntary aid organizations, by ensuring requisite arrangements and regulatory frameworks.²⁷ civil defence organisations,²⁸ National Information Bureaux,²⁹ Mixed Medical Commissions.³⁰

²¹ *General provisions relating to State responsibility*: Arts. 49–54 of Geneva Convention (I); Arts. 50–53 of Geneva Convention (II); Arts. 129–132 of Geneva Convention (III); Arts. 146–149 of Geneva Convention (IV); Arts. 85–91 of AP I, 1977; Art. 6 of AP III, 2005.

²² *Provisions relating to War Crime*: Arts. 49–50 of Geneva Convention (I); Arts. 50–51 of Geneva Convention (II); Arts. 129–130 of Geneva Convention (III); Arts. 146–147 of Geneva Convention (IV); Arts. 11, 85–90 of AP I, 1977.

²³ *Provisions relating to Compensation*: Art. 91 of AP I, 1977.

²⁴ *Provisions relating to fundamental guarantees are found in various provisions*: Arts. 3, 12 of Geneva Convention (I); Arts. 3, 12 of Geneva Convention (II); Arts. 3, 13–17 of Geneva Convention (III); Arts. 3, 27–34 of Geneva Convention (IV); Arts. 11, 75–77 of AP I, 1977; Arts. 4–5, 7 of AP II, 1977.

²⁵ *Provisions relating to use/misuse of emblems, signs or signals*: Arts. 44, 53–54 of Geneva Convention (I); Arts. 44–45 of Geneva Convention (II); Arts. 18, 37–38, 66, 85, Annex I of AP I, 1977; Art. 12 of AP II, 1977; Arts. 2, 3, 4, 6 of AP III, 2005.

²⁶ *Provisions relating to experts and advisers (qualified persons, legal advisers)*: Arts. 6, 82 of AP I, 1977.

²⁷ Art. 26 of Geneva Convention (I); Art. 63 of Geneva Convention (IV); Art. 81 of AP I, 1977; Art. 18 of AP II, 1977; Art. 3 of AP III, 2005.

²⁸ Art. 63 of Geneva Convention (IV); Arts. 61–67 of AP I, 1977.

²⁹ Arts. 122–124 of Geneva Convention (III); Arts. 136–141 of Geneva Convention (IV).

³⁰ Art. 112, Annex II of Geneva Convention (III), 1949.

9. In the process of selecting military sites and in the examination, development, acquisition, and integration of novel weapons, means, and methods of warfare, due consideration must be given to International Humanitarian Law (IHL).³¹
10. To facilitate the establishment of hospital zones, neutralized areas, and demilitarized zones, it is imperative to coordinate and implement the requisite arrangements.³²

States parties are obligated to enact precise implementation measures in accordance with other treaties pertaining to International Humanitarian Law.³³ These treaties encompass diverse facets of both international and non-international armed conflicts, providing safeguards and protections for the victims affected by such conflicts.,³⁴ means and methods of warfare,³⁵ naval and air-warfare,³⁶ cultural property,³⁷ criminal repression³⁸ and other treaties relating to IHL.³⁹

V. CONCLUSION

International Humanitarian Law (IHL) stands as a crucial instrument for safeguarding human life and preserving dignity during periods of armed conflict. It establishes a comprehensive framework for overseeing the conduct of hostilities, ensuring the protection of both combatants and non-combatants. Nevertheless, IHL is not without imperfections and is frequently breached in times of war. Despite its inherent limitations, IHL remains an indispensable safeguard for humanity in armed conflicts. It is imperative to persist in fortifying and upholding IHL, actively working to prevent violations of its principles. The international community has taken significant strides in reinforcing IHL, exemplified by the adoption of the Geneva Conventions and Additional Protocols. Concurrently, there has been a notable surge in initiatives aimed at

³¹ *Military sites*: Art. 36 of AP I, 1977; *Protected zones and localities*: Arts. 57–58 of AP I, 1977.

³² Art. 23, Annex I of Geneva Convention (I); Arts. 14, 15 of Geneva Convention (IV); Arts. 59–60, Annex I of AP I, 1977.

³³ “Implementing International Humanitarian Law: From Law to Action”, Advisory Service on International Humanitarian Law, available at https://www.icrc.org/en/doc/assets/files/other/implementing_ihl.pdf : last accessed 20-11-2023.

³⁴ Convention on the Rights of the Child, 1989; Optional Protocol on the Involvement of Children in Armed Conflict, 2000; AP III to the Geneva Conventions, 2005.

³⁵ Convention prohibiting Chemical Weapons, 1993; CCW Protocol (IV) on Blinding Laser Weapons, 1995; CCW Protocol (II) prohibiting Mines, Booby-Traps and Other Devices, amended 1996; Anti-Personnel Mine Ban Convention, 1997

³⁶ London Treaty on Limitation and Reduction of Naval Armaments, 1930; Procès-verbal on Submarine Warfare of the Treaty of London, 1936; San Remo Manual on Armed Conflicts at Sea, 1994.

³⁷ Roerich Pact for the Protection of Artistic and Scientific Institutions, 1935; Final Act on the Protection of Cultural Property, The Hague, 1954; Hague Convention for the Protection of Cultural Property, 1954; Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict, 1954

³⁸ Statute of the Special Court for Sierra Leone, 2002; Amendment to the Statute of the International Criminal Court, amended Art. 8, 2010; Amendment to the Statute of the International Criminal Court, 2010.

³⁹ Convention on Mercenaries, 1989; Convention for the Protection of all Persons from Enforced Disappearance, 2006; Arms Trade Treaty, 2013.

promoting awareness of IHL, facilitated through educational and training programs. The trajectory of IHL's future hinges on the collective capacity of the international community to confront emerging challenges. This necessitates a renewed commitment to the enhancement and enforcement of IHL, coupled with a concerted effort to amplify awareness of the legal framework. Through these concerted actions, we can ensure that IHL retains its pivotal role in protecting human life and dignity amid armed conflicts.
