

Historical Development of IHL

Introduction

- International humanitarian law (IHL), or the law of armed conflict (LOAC), is a set of rules which seek to limit the effects of armed conflict for humanitarian reasons.
- Consists of treaties and conventions between States, customary rules (state practice and *opinio juris*), general principles of law and subsidiary sources of law.
- Distinct from *jus ad bellum* - IHL is termed as *jus in bello*.

Basic Principles and Limits of IHL

Principles

- Distinction between civilians and combatants
- Protection to attack those *hors de combat*
- Prohibition to inflict unnecessary suffering
- Principle of necessity
- Principle of proportionality

Limits

- Does not prohibit the use of violence
- Cannot protect all those affected by an armed conflict
- No distinction based on the purpose of the conflict
- Does not bar a party from overcoming the enemy
- Presupposes that parties to an armed conflict have rational aims that do not contradict IHL.

Jus ad bellum vs Jus in bello

- Jus ad bellum - law applicable to recourse to armed conflict (law of the use of force).
- Jus in bello - law applicable in armed conflict (IHL).
- Jus post bellum - law applicable during the transition from war to peace.

Historical development

- Two common principles in historical rules of war
 - Common understanding of the need for regulations of some kind, even during wars
 - The feeling that, in certain circumstances, human beings, friend or foe, deserve some protection.
- As early as 3000 BC - rules to protect certain categories of victims of armed conflict, and regulations limiting the use of means and methods of warfare.
 - E.g., prohibition to poison wells, prohibition to kill prisoners of war.
 - Across regions - Asia, Africa, pre-Columbian America and Europe.
 - However, often did not apply to people from different regions, traditions, ethnic or religious group.
- Modern IHL begins with Henry Dunant's 'A Memory of Solferino', memoirs of the Battle of Solferino between French, Italian and Austrian forces - led to the establishment of small committee that would later become the International Committee of the Red Cross.

Historical development

Different codes of conduct and rules adopted to regulate war

- Sumerians: war as a state governed by the law, started by a declaration of war and terminated by a peace treaty. War subject to specific rules, e.g., guaranteed immunity to enemy negotiators.
- Hammurabi King of Babylon (1728-1686 BC): Code of Hammurabi for the protection of the weak against oppression by the strong and ordered that hostages be released on payment of a ransom.
- Hittites (13th century BC): declaration of war and for peace to be concluded by treaty, as well as respect for inhabitants of an enemy city which has capitulated.
- Cyrus I, King of the Persians (7th century BC): ordered the wounded Chaldeans to be treated like his own wounded soldiers.
- Indian Mahabharata (400 BC) and Laws of Manu: prohibitions on the killing of a surrendering adversary who was no longer capable of fighting; forbidding the use of certain means of combat, and the protection of enemy property and prisoners of war.
- Ancient Greeks: spared temples, embassies, priests and envoys of the opposite side and exchanged prisoners of war.

Historical development

- Islamic history
 - First caliph, Abu Bakr (c. 632): The blood of women, children and old people shall not stain your victory. Do not destroy a palmtree, nor burn houses and cornfields with fire, and do not cut any fruitful tree. You must not slay any flock or herds, save for your subsistence.
- Middle Ages
 - St. Augustine - protecting women, children and the elderly from hostilities; respect for holy places as places for refuge. Knights fought according to certain rules

Classical Phase - 1864 to 1949

- Henry Dunant's memoirs of the Battle of Solferino 1859 - A Memory of Solferino, published in 1862
 - Many injured left on the battlefield without water, food or medical care. Lack of adequate medical staff and facilities.
 - Book laid the groundwork for societies for the relief of the wounded on the battlefield.
- Lieber Code, issued in 1863 by US President Abraham Lincoln - rules of conduct during hostilities for Union soldiers throughout the US Civil War.
 - Detailed, but some rules not part of modern IHL, e.g., starving of civilians.

Classical Phase - the 1864 Geneva Convention

- Dunant's suggestions taken up by Geneva Society for Public Welfare. Culminated in Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864.
 - All countries adopt a uniform flag and sign for their medical corps and facilities
 - Medical personnel, hospitals and ambulances, and the wounded, should be recognised as neutral.
- Founding of the International Committee of the Red Cross - Red Cross and Red Crescent Movements.

Classical Phase - St. Petersburg Declaration 1868

- First international agreement to prohibit particular weapons
- Agreement to prohibit exploding bullets as an inhumane form of weapon.
- Three basic principles - distinction, proportionality and reducing unnecessary suffering.

Classical Phase - 1899 and 1907 Hague Conventions

- Define the rules that belligerents must follow during hostilities, such as the means and methods of warfare.
- 1899 Conventions Include
 - Pacific settlement of disputes
 - Prohibition on the use of projectiles that disperse asphyxiating gas
 - Prohibition on the use of bullets that expand or flatten easily in the human body.

Classical Phase - 1907 Hague Conventions

- The pacific settlement of disputes (based on The Hague Convention I of 1899);
- The opening of hostilities (The Hague Convention III);
- The laws and customs of war (Convention IV, with annexes and regulations, which develops Convention II of 1899 and cases of military occupation);
- The rights and duties of neutral powers in case of war on land (Convention V);
- The status of merchant ships at the outbreak of hostilities (Convention VI);
- The conversion of merchant ships into war ships (Convention VII);
- The laying of automatic submarine contact mines (Convention VIII);
- The bombardment by naval forces in time of war (Convention IX);
- The adaptation to maritime war of the principles of the Geneva Convention of 1906 (Convention X);
- Restrictions with regard to the exercise of the right of capture in naval war (Convention XI);
- The establishment of an international prize court (Convention XII);
- The rights and duties of neutral powers in naval war (Convention XIII).

Classical Phase - Geneva Convention 1906

- Conference organised by Swiss Government and attended by 35 States. New Convention replaced 1864 Convention.
- New developments:
 - New provisions were included concerning the burial of the dead and the transmission of information.
 - The voluntary aid societies were for the first time expressly recognized. On the other hand, provisions which had proved to be impracticable were changed.
 - The prerogatives of the inhabitants bringing help to the wounded were reduced to more reasonable proportions, and the duty to repatriate the wounded who are unfit for further service was transformed into a mere recommendation.

Classical Phase - Geneva Convention 1929

- Provisions on the treatment of prisoners of war. Completes the provisions of the Hague Regulations.
- Includes
 - Prohibition of reprisals and collective penalties
 - Organisation of prisoners' work
 - Designation of representatives by prisoners
 - Control exercised by protecting powers.

Replaced by Third Geneva Convention 1949.

Modern Phase - Post World War II

- Modern developments in IHL followed humanitarian concerns in the aftermath of the Second World War.
- International human rights law (IHRL) developed to fill in the gaps where IHL is not applicable.
- Four Geneva Conventions 1949 and two Additional Protocols 1977.

Modern Phase - Geneva Conventions

First Convention

- Protects wounded and sick on the field, as well as medical and religious personnel, and medical units and transport.
- Distinctive emblems.
- Two annexes for draft agreement on hospital zones and model identity card for medical and religious personnel.

Second Convention

- Protects wounded, sick and shipwrecked military personnel at sea during war.
- Specifically applicable to war at sea.
- Annex on model identity card for medical and religious personnel.

Modern Phase - Geneva Conventions

Third Convention

- Prisoners of war status and protections.
- Conditions and places of captivity precisely defined.
- Principle of release and repatriation without delay after cessation of hostilities.
- Five annexes

Fourth Convention

- Protection of civilians, including in occupied territory.
- General protection of populations against certain consequences of war.
- Status and treatment of protected persons.
- Obligations of the occupying power to civilian population, including provisions for humanitarian relief.
- Regime for treatment of civilians.
- Three annexes

Modern Phase - Additional Protocols

- Additional Protocol I - applies to international armed conflicts, including wars of national liberation.
- Additional Protocol II - applies to non-international armed conflicts between States and non-State armed groups.
- Key points
 - Strengthen protection of victims
 - Place limitations on the way wars are fought.
- Additional Protocol III in 2005 - created an additional emblem, the Red Crystal.