THE INTERSECTION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW: AN APPRAISAL

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Abstract

This paper assessed the historical evolution of International Humanitarian Law (IHL) as a compendium of codes of warfare. Using the doctrinal legal research method, the researcher found that the formal idea of an International Humanitarian Law was only codified via the 1977 Additional Protocols to the Geneva Conventions. It was equally revealed that while many of the provisions of the Protocols remained vague and contested, with their status and the humanitarian vision of the law they outlined being uncertain for some time, it was only at the end of the 20th century that international lawyers, following the lead of human rights organizations declared Additional Protocol I to be authoritative and the law of war to be truly humanitarian. It was concluded that International Humanitarian Law is not simply a historical code, managed by States and promoted by the International Committee of the Red Cross, but rather a serious area of International Law that has a significant nexus with International Criminal law and which State parties have an obligation to see to its enforcement, failing which the machinery of International Criminal Tribunals or the United Nations Security Council will be activated to enforce punishment. It was recommended *inter alia* that developing states should not only ratify these Conventions and Protocols but should further take steps to domesticate them especially in view of the fact that they have become part of Customary International Law.

Keywords: Customary International Law, Geneva Convention, Human Rights, International Humanitarian Law, International Criminal Law.

1. Introduction

Historically, the advent of what is now known as International Humanitarian Law was inspired by a proposal by Henry Dunant in 1862 that nations should form relief societies to provide care for the wounded in wartime. This proposal was not unconnected with the outcome of what has been termed one of the bloodiest battles of the nineteenth century in Solferino.[1] This laid down the foundation for the Geneva Conventions and indeed led to the establishment of the International Red Cross. On the 22nd of August 1864, twelve nations signed the first Geneva Convention, agreeing to guarantee neutrality to medical personnel to expedite supplies for their use and to adopt a special identifying emblem for them which since the 1870s has been a red cross on a white background.[2] However, the Geneva Conventions adopted prior to 1949 were concerned with the treatment of soldiers, but following the events of World War II, it was understood that a Convention for the protection of civilians in wartime was also crucial.

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1 Humanrights.ch "The History of International Humanitarian Law; [2011], <www.humanrights.ch>, accessed 29th May, 2024.

2 Convention for the Amelioration of the Condition of the Wounded in Armies in the field. Geneva, 22 August 1864.

Equally developed alongside the Geneva Conventions were the Hague Conventions created by states to govern the conduct of war. The Hague Conventions are various international treaties that emerged from the Hague Peace Conferences in 1899 and 1907. At these Conferences, limitations on armaments, for example, a prohibition on the use of air bombs and chemical warfare, and expansion of armed forces were proposed. The two Conventions established a model for multilateral meetings to create international laws and subsequently influenced the formation of the League of Nations in 1919.[3]

Equally significant is the Geneva Protocol to the Hague Convention, which is considered an addition to the Hague Convention, although not drafted in The Hague. This Protocol entered into force on the 8th of February 1928 and permanently banned the use of all forms of chemical and biological weapons. This was drafted following the use of mustard gas and similar agents in World War I, and fears that such warfare in the future could lead to severe consequences.[4] The protocol has since been amended by the Biological Weapons Convention in 1972 and the Chemical Weapons Convention in 1993.

The Hague Conventions, as opposed to the Geneva Conventions, which are concerned with the treatment of personnel and civilians, mainly detail the permitted conduct for war. Thus, sometimes international lawyers locate international humanitarian law in a long history of codes of warfare that straddle different times and cultures. This paper, therefore, aims to examine the evolution of humanitarian law and practice by tracing how it was created, then fought for, and finally won in the 1970s through the propitious convergence of a range of different actors and interests. It equally seeks to evaluate the basis of criminal liability for violations of human rights in the course of war in the nature of war crimes.

2. The Shift from Sovereignty to Humanitarianism

International Humanitarian Law[5] or *jus in bello*, is the law that governs how warfare is conducted. Thus, International humanitarian law is purely humanitarian, seeking to limit suffering caused in the course of war. It is independent from questions about the justification or reasons for war, or its prevention, covered by *jus ad bellum*.[6] As such, *jus ad bellum* is sometimes considered a part of the laws of war, but the term "laws of war" can also be considered to refer to *jus in bello*, which concerns whether a war is conducted justly, regardless of whether the initiation of hostilities was just.

Indisputably, the new name represented, as its adherents fully understood, not just a shift in terminology but also a fresh approach to the *jus in bello*. It indicated a new field of law, an enlarged humanitarian law, endowed with an appropriate array of humanitarian principles. The 1977 Additional Protocols to the Geneva Conventions were the repository of these principles as they held the outline of the new field.[7] Yet, despite this accomplishment, international humanitarian law and the humanitarian understanding of the *jus in bello* remained controversial for almost two decades, as States and legal commentators questioned the Protocols' principles and authority.

It was only at the very end of the 20th century that practitioners of international humanitarian law, following the example set by human rights organizations, suddenly accepted the

3 Convention (IV) respecting the laws and customs of war on land and its annex: Regulations concerning the laws and customs of war on land. The Hague, 18th October, 1907

4 Registered in League of Nations Treaty Series on 7th September, 1929.

5 IHL.

6 Amanda Alexanda, "A Short History of International Humanitarian Law", *The European Journal of International Law*, [2015], (26) (1), 109-138.

7 *Ibid*

authority of Additional Protocol I and with it, a humanitarian vision of the *jus in bello*. This shift can be seen in both the newly confident use of the term "International humanitarian law" to describe all the laws of war,[8] and a revised understanding of the content of this law - an understanding that is exemplified in the changing interpretation of the principle of proportionality.

The history that follows, of how this change in the language and understanding of the *jus in bello* came about, shows that it was a contested and contingent process. Moreover, it reveals that the contest for international humanitarian law was played out by a diverse cast of actors, which include both the conventional contributors to international law and other less traditional, less acknowledged participants. As such, this history explains how one important aspect of the paradigm shift from sovereignty to humanitarianism in international affairs - a shift that has been observed by several scholars - was accomplished.[9] At the same time, it also shows something about the nature of International humanitarian law itself, by illustrating its curious allocation of authority, its potential for change, and its restrictions on variation.

International humanitarian law thus refers to the current understanding of the laws concerning the conduct of warfare. Indeed, the International Committee of the Red Cross,[10] which is considered to have a special relationship with International Humanitarian Law as its guardian and promoter, describes it in the following manner:

> International humanitarian law is part of the body of International law that governs relations between states. It aims to protect persons, who are not, or are no longer taking part in hostilities, the sick and wounded, prisoners, and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.[11]

The ICRC's explanatory definition is unexceptional; lawyers provide similar definitions.[12] International Humanitarian Law is thus, broadly speaking, that branch of public international law that seeks to moderate the conduct of armed conflict and to mitigate the suffering that it causes. Indeed, international lawyers tend to gloss this general statement with the comment that traditionally the term "International humanitarian law" was applied to the "Geneva" part of the *jus in bello*, which was more concerned with the methods of warfare. They then state however that this division has long been highly artificial from a number of points of view.

Indisputably, both parts of the law, it is argued are based on humanitarian concerns and therefore overlap. Indeed, as Cherif Bassiouni says, "they are so intertwined and so overlapping that they can be said to be two sides of the same coin".[13] Thus, it is reiterated that the term International Humanitarian Law can refer to all of the rules of International Law that concern armed conflict, whether customary, conventional, Hague or Geneva.

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8 T Meron, 'The Humanization of Humanitarian Law', *American Journal of International Law (AJIL)*, [2000] (94) 239.

9 R Teitel, *Humanity's Law*, (Oxford, Oxford University Press, 2011), 218.

10 ICRC.

11 ICRC, "War and International Humanitarian Law", [2010], <www.icrc.org/eng/war-and-law/overview/war-and-law.htm>, accessed 31st January, 2024.

12 C Greenwood, "Historical development and Legal Basis", in Fleck, D and Brothe, M., (eds), *The Handbook of International Humanitarian Law*, [2008], 1 @ 11.

13 M Bassiouni, 'The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities', *Journal of Transnational Law and Contemporary Problems*, [1998] (8) pp.199 @ 200.

3. Approaches to the emergence of International Humanitarian Law

Regarding the emergence of International Humanitarian Law, there are two common ways that international lawyers think about the history of IHL: One is the story of the humanization of war and law; the second is a story of imperialism and oppression. According to Orthodox history of International Humanitarian Law, laws of war have always existed to limit the destruction of war. The ancients, the Knights of the Middle Ages and the jurists of the early modern period all testify to the record of this concern.[14] Nor is it just a Western concern. In fact, other cultures such as China, Japan, India and the Islamic world have their own traditions of rules of warfare. Yet, despite this universal concern, the attempt to limit war has suffered various setbacks. It was therefore not until the 19th century that a movement to codify the laws of war began and modern international humanitarian law was born.

It is noteworthy that this orthodox narrative tends to conflate a long history of varied approaches to the laws of war with modern international humanitarian law. Although it is acknowledged that earlier approaches to the laws of war were not identical with modern International Humanitarian Law, their shared 'humanitarian' values are stressed and points of continuity are emphasized.[15] In any case, while it is sometimes stated that the term "International Humanitarian Law" is new, it is not usual for a writer to state exactly how new it is or when and why the term started to be used.

This confusion is compounded as the two terms "International Humanitarian Law" and "Laws of War" are often used interchangeably in the historical account- thereby further obscuring any point of variance between them. In this way, the orthodox narrative is able to juxtapose the image of a long tradition of humanitarian law with the achievements of the modern age. The result is that the values of International Humanitarian Law appear universal and ahistorical, while their modern codification is laudable.

Regarding the second approach which describes International Humanitarian Law as a history of oppression and imperialism, drawing on post-colonial and critical methodologies, lawyers describe a history in which military and Western needs have consistently trumped human values, exposing civilians to the violence of war and legitimizing their suffering.[16] In these historical accounts, the catalogue of treaties is a library of compromise and pragmatism. The effect then can be summarized as follows: the 1868 Declaration of Saint Petersburg was a pointless failure; the 1907 Hague Conventions left military necessity unchallenged and the dominant value of the laws of war and civilians more vulnerable than ever to the scourge of combat; the Nuremberg Tribunal actually helped legitimize unrestrained conduct in war by refusing to convict, or even prosecute based on violations of the laws of war; even the contemporary values of humanitarianism have been called into question, with David Kennedy identifying its ability to conceal problems and misdirect attention.[17]

Both this negative account and the more common orthodox history it reacts to place the contemporary understanding of international humanitarian law in a long continuum with other codes of warfare. By deploying or relying on these histories, lawyers can suggest the longevity of International Humanitarian Law and bolster any claim they might wish to make about the law. For instance, supporters of International Humanitarian Law will find it easier to claim that a principle of IHL is well established, unarguable, or obvious if it is considered part of a long tradition.

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14 M Sassoli, & A. A Bouvier, "How Does Law Protect in War?" *ICRC Casebook*, [2011], pp. 124-125.

15 See, Greenwood, *Op. cit.*

16 J. G Gardam, & M. J Jarvis, "Women, Armed Conflict and International law", (New York: Springer, 2001), 11.

17 *Ibid* at 12

Besides, an established history makes claims to the moral validity, authority, and status of the field itself harder to refute. Alternatively, for those who wish to attack or change International Humanitarian Law, placing it in a long history makes it easier to draw connections with a tradition of oppression. In this way, histories of international humanitarian law not only reflect but also help to shape the current understanding of the field.

It must be noted that despite the widespread acceptance of these long histories of International Humanitarian Law, both the term "International Humanitarian Law' and the particular conceptualization of the *jus in bello* that it evokes are fairly new. Prior to the 1960s, the term "International Humanitarian Law" was not used to describe a field of law, and even when the term started to be used in the 1960s it still denoted quite a different understanding of the law to its current incarnation. Before this period, common and academic usage referred first to the "laws of war" and later in the 1960s, to the "laws of armed conflict" in an attempt to comprehend de facto and internal conflicts.[18]

4. The Nexus between International Humanitarian Law and International Criminal Law

It is instructive to note that International Criminal Law *stricto sensu* must be understood as the totality of International Law norms of a penal nature which cojoins typical legal consequences of Criminal Law with a decisive conduct – namely the International Crime, and as such can be applied directly.[19] The four core International Crimes for which International Law is said to provide direct individual criminal responsibility are: genocide, crimes against humanity, war crimes, and the crime against aggression as incorporated under *Article 6* to *Article 8* of the Rome Statute.[20] Against this background, and to the extent that these crimes are committed routinely in the course of war, International Humanitarian Law cannot be divorced from International Criminal Law.

International Humanitarian Law is a branch of customary and treaty-based International positive law with the primary purpose of limiting the methods and strategies of warfare. The aim is to protect victims of armed conflicts, grave breaches of rules of armed combatant engagement which in actual fact constitute war crimes for which individuals may be held directly responsible, thus creating obligations on sovereign States to prosecute actors.[21] The rationale for criminalizing violations of International Humanitarian Law appears to be premised on the realization that there must be limits to violence in the course of war, and that those limits must be established by the law so that those responsible may be punished as a deterrent to others.

Regarding the relationship between International Humanitarian Law and International Criminal Law, it must be noted that International Criminal Law plays an important role in this regard by placing responsibility on individuals for serious atrocities including, but not limited to genocide, war crimes, crimes against humanity, and the crime of aggression. This approach takes the form of evaluating the entire idea of International Criminal Law and its

18 Schwarzenberger, G.,'From the laws of War to the Law of Armed Conflict'; *Journal of Public Law*, [1968] (17) 61.

19 K. Ambos, *Treatise on International Criminal Law: Volume 1 – Foundations and General Part*, (Oxford: Oxford University Press, 2013), p.54.

20 N. Baister, 'Transnational Criminal Law', *European Journal of International Law,* [2003] (14) 961-962.

21 D. T., Hortensia, Posse Gutierrez, 'The Relationship Between International Law and the International Criminal Tribunal', *International Review of the Red Cross*, [2006], (88) (861).

relevance to humanitarian actors within the arena of International Humanitarian Law.[22] The purpose of International Humanitarian Law and International Criminal Law is thus to establish limits to violence while providing punishment for those responsible.

Consequently, International Criminal Law and International Humanitarian Law work together to address serious violations of human rights and International Law. Thus, in practical terms, the synergy between the two branches of law is structured by way of a partnership in which, while International Criminal Law prosecutes individuals for war crimes and other violations, International Humanitarian Law principally protects victims of armed conflict by limiting the means of warfare.[23] In effect, International Criminal Law supports the enforcement of International Humanitarian Law by holding actors accountable. This in effect means that International Criminal Law Tribunals can try crimes if a State is unable or unwilling to prosecute perpetrators. These International Criminal Tribunals are traditionally instituted by treaty. Such situations may equally be treated by binding decisions of the United Nations Security Council.[24]

Paradoxically, despite the obvious interrelationship between these two branches of International Law, there appears to be a glaring divergence on the attitude of States towards their acceptance. Indeed, while there is no significant hostility towards the basic norms of International Humanitarian Law, curiously, there is a glaringly unsettling resistance to International Criminal Law. This is particularly so in respect of aspects that potentially encroach on independence, sovereignty and territorial integrity, or aspects that smack of Western neo-colonialism. This frostiness usually manifests in their responses to external threats of accountability against political leaders, the exercise of universal jurisdiction, Security Council referrals to the International Criminal Court, Pillar Three of the R2P doctrine, the crime of aggression, and certain formulations of other International crimes, *et cetera*.[25]

5. Conclusion/Recommendations

In conclusion, it must be noted that the development of international humanitarian law is still ongoing. Indeed, in the 21st century, it has developed new aspects, in particular a more clearly enunciated association with human rights law. It has also faced new challenges brought by the war on terror.[26] Yet both the potential for these developments and the particular form of the new challenges depended on the specific understanding of the *jus in bello* as international humanitarian law, as articulated in Additional Protocol I on the basis of which International humanitarian law has won general acceptance.

The fact still remains that International humanitarian law did not begin in the mists of time, nor was it fashioned by Dunant when he created ICRC. Rather, the history of International humanitarian law was forged in two rapid periods of change. It began in the 1970s when it was suddenly posited as a field of law whose precepts were outlined in the Additional Protocols to the Geneva Conventions. The idea of an international humanitarian law, together with the acceptance of the Additional Protocols then faltered for almost two decades. It was only at the end of the 1990s that suddenly and without any formal mechanisms, Additional

22 Chris Kenks, "International Criminal Law and its Role in Addressing Violations of International Humanitarian Law", [2015], Online Learning Paper by the International Association of Professionals in Humanitarian Assistance and Protection, <https://www.phap.org> Last accessed, 3rd March, 2025.

23 *Ibid.*

24 *Ibid.*

25 Suzannah Linton, "International Humanitarian Law and International Criminal Law", [Oxford Academic, 2019], <https://doi.org> Last accessed, 4th March, 2025.

26 A Walen, 'Transcending But Not Abandoning the Combatant-Civilian Distinction: A Case study', *Rutgers Law Review*, [2010-2011] (63) 1149.

Protocol I became accepted as the basis for a uniquely strict understanding of International humanitarian law as the *jus in bello*.

These moments of rapid change were not achieved by a straight forward process of codification nor were they achievements of states alone. Rather, international humanitarian law was formed through the intersection of the work of a diverse group of actors, each focused on their own particular aims, strategies, or tasks. Some of these actors are acknowledged participants in international law, such as the states involved in the diplomatic conference of 1974 or the ICRC who played out their roles in a somewhat different manner to that which is usually envisaged. Other important actors were the human rights organizations such as Human Rights Watch[27] and Amnesty International both of which were as important in the dissemination and acceptance of international humanitarian law as ICRC.

The acceptance of the human rights organizations' approach and its translation into legal orthodoxy relied on the work of another group of participants in international law: academic international lawyers. The fact that HRW's interpretation of international humanitarian law was considered authoritative at the end of the 1990s, but not at the beginning of the decade was largely due to the willingness of international lawyers and academics to accept and repeat their pronouncements. It has long been noted that academics have an unusually important role in the determination of international law.

In the light of the foregoing, the following recommendations are hereby put forth to strengthen the development of International humanitarian law:

- Developing states should not only ratify these conventions and Protocols, but should further take steps to domesticate them, especially because they have become part of customary International law.
- Human Rights organizations should take steps to ensure the understanding of the law by citizens, while academics should consolidate it.
- The ICRC and other International civil rights organizations should introduce criticism of non-conformist states as this has the potential to constrain state action as much as the rules that states have consciously chosen to accept. In so doing, any state, even if it is not a party to Additional Protocol I, which fails to apply its precepts can expect international censure.

[27] HRW.