

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

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International Humanitarian Law: A Balance between Military Necessity and Humanity

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ABSTRACT

“Two armies that fight each other is like one large army that commits suicide.”

- Henri Barbusse²

War is one of those human conducts which have existed ever since the human race started to exist. Humanitarian law is always referred to as the norms of war. A detailed discussion about the genuineness of it will be further discussed in the paper. War is a very general term in its sense. The more legal word for it is armed conflict and the law that governs it is called the law of armed conflict or international humanitarian law. The two branches in regard to humanitarian law are the Hague law and the Geneva Law, when distinguished broadly. Other than these two branches, a various number of treaties are also considered to be part of international humanitarian law but we won't discuss those in this paper. In an armed conflict, human rights are indeed violated. But it abides by the permissible limit. Since in armed conflict it is necessary to inflict harm on the enemy personnel, this is the reason why the principle of humanity comes into the scenario. This paper shows the traces of humanitarian law in history starting from being not codified to the journey of becoming codified. In the further portions of the paper, the researcher will discuss principles and parts of the Hague and the Geneva laws which deals with the balance between the two key principles of international humanitarian law. Although warfare has three basic lines, land, sea and air, but here, it is only the warfare conducts related to air and sea have been elaborated since the Geneva Conventions do not deal with the aerial warfare conducts.

Keywords: *Military necessity, humanitarian law, humanity, prisoners of war, armed conflict.*

I. INTRODUCTION

International War is the ultimate form of human relations. While war has always existed, but the codification of war conducts has only began after the Battle of Solferino³. War has been

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² He was a French soldier and an author who was born in Moscow and has been a firsthand witness of the French soldiers in the WWI. This excerpt has been taken from his famous novel titled “Le Feu”.

³François Bugnion, *From Solferino to the Birth of Contemporary International Humanitarian Law* (2009), <https://www.icrc.org/en/doc/assets/files/other/solferino-bugnion-icrc.pdf>. (last accessed Aug. 06, 2020).

defined by many jurists. One such definition by Prof. Oppenheim is, “war is a contention between two or more states, through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases”.⁴ According to Oppenheim the principal objective of war is to overwhelm the enemy and impose conditions of it.⁵ The traditional warfare methods needed a reform for a number of reasons and one such reason was the need of introduction of human rights during war. And therefore, Joseph L. Kunz has correctly remarked “that the laws of war are actually in a chaotic state and urgently need revision is a fact which cannot be challenged.”⁶ A few years later the changes compelled J.G. Starke to say that there are significant changes in the modern wars. Legal regulation of war was probably the most important development of the twentieth century. All the conventions of Geneva along with the additional protocols, including the Hague law and the Geneva Law deals with humanitarian law concerns. These two conventions are very closely knitted and have become a complex structure known as the humanitarian law. So whenever the humanitarian law is referred to as The Laws of Geneva or the Geneva Laws, it is not so. It is a blend of the two.⁷

Apart from these, there are other international treaties that are also part of international humanitarian law such as the 1954 Convention on the Protection of Cultural Property during armed conflict, the 1972 Biological Weapons Convention, the 1980 Convention on Conventional Weapons, the 1993 Convention on Chemical Weapons and the 1997 Ottawa Convention on anti-personnel mines.⁸ The Hague Regulations respecting the Laws and Customs of War on Land are generally considered a corresponding to customary international law which is binding on all States independently of their acceptance of them while the Geneva Conventions have attained universal ratification.

II. HISTORY OF THE BATTLEFIELD CODES

“All is fair in love and war”?! At least not in war and therefore there was a need to frame the regulations relating to war. From the 16th century onwards, several independent nations were

⁴Greenwood, Christopher, *The Concept of War in Modern International Law*, THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY, vol. 36, no. 2, 1987, pp. 283–306. *JSTOR*, www.jstor.org/stable/759997. (last accessed on Aug. 09, 2020).

⁵ *Ibid.*

⁶Kunz, Josef L, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 45, no. 1, 1951, pp. 37–61. *JSTOR*, www.jstor.org/stable/2194782 (last accessed on Aug. 09, 2020).

⁷*International Legal Protection Of Human Rights In Armed Conflict* (2011), OHCHR, New York & Geneva, https://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf (last accessed on Aug. 07, 2020).

⁸*Treaties and customary law*, ICRC,(29.10.2010) <https://www.icrc.org/en/document/treaties-and-customary-law>. (last accessed on Aug. 06, 2010).

taking a step towards adopting codified principles to be followed during the war times. In 1590, Netherlands adopted “*Articles of War*”. In 1621, Sweden’s *Gustavus Adolphus* published his “*Articles of Military Lawwes to Be Observed in the Warres*”, which become the basis for England’s later Articles of War in the later times.⁹ Afterwards, these English Articles became the basis for the United States’ first Articles of War. In 1648, the *Treaty of Westphalia*, was the first treaty between warring states which required that the captured soldiers be returned without any ransom. Even though these early European codes are unlike and geographically scattered as they were, are still significant and established precedents for other states and raised enforcement models for battlefield offenses – courts-martial, in the case of the *British Articles of War*.¹⁰ Limitations on conducts of warfare have always been there which are centuries old but most of them were customs and unwritten until 1864, when the first Geneva Convention was adopted.¹¹ By the mid-nineteenth century, states began writing codes, which in today’s term might be referred as the military laws that incorporated humanitarian ideals for their soldiers – the violation of which called for punishments. At the same time, there were few multinational treaties that imposed accepted limitations on battlefield conduct, with penalties for their violation. In the second half of the nineteenth century, the previously common battlefield practices and restrictions began to merge into generalized rules, becoming codified and extended in the form of treaties and domestic laws.

The initial text of the 1864 Geneva Convention was revised and recast in 1906 and later on in 1929. Later in the year 1949 the current version of the Geneva Conventions was adopted which have achieved a universal ratification. The Geneva Conventions completely changed the way of waging wars. The core of International Humanitarian Law is the Geneva Conventions.¹²

III. A BASIC IDEA OF INTERNATIONAL HUMANITARIAN LAW

The International Committee of the Red Cross (ICRC) defines International humanitarian law as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict”.¹³ It protects persons who are not or are no longer participants of the armed conflict and restricts the means and methods of warfare. International humanitarian law is also known as the law of

⁹Gary D. Solis, *The Law of Armed Conflict International Humanitarian law in War* (2010), CAMBRIDGE UNIVERSITY PRESS.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³*What is International Humanitarian Law*, ICRC, (Dec. 31, .2014) <https://www.icrc.org/en/document/what-international-humanitarian-law> (last accessed on Aug. 06, 2020).

war or the law of armed conflict.¹⁴IHL is a part of public international law.¹⁵IHL regulates activity during armed conflict. It is distinct from, and applies irrespective of, the body of law that regulates the recourse to armed force. The framework of rules and laws that govern the conduct of armed conflict is termed as *jus in bello* and the rules and laws that govern the lawfulness of the resort to armed conflict is called *jus ad bellum*.¹⁶ International humanitarian law is applicable during outbreak of an armed conflict.

International humanitarian law prohibits the deliberate killing of a combatant if he or she surrenders or is a *hors de combat*. International humanitarian law also prescribes the parties to a conflict to refrain from attacking civilians and binds them to take constant care to prevent civilians being incidentally killed in attacks against combatants or military objectives.¹⁷

IV. PRINCIPLE OF MILITARY NECESSITY

The principle of military necessity is one of the most important concepts relating to the laws of war yet one of the most elusive.¹⁸No principle in IHL is more central or more misunderstood than that of military necessity.¹⁹Military necessity can be found to have a number of mentions throughout the Geneva Conventions but the phrase “military necessity” is nowhere defined. It is from the words and intentions of the conventions that the principle or the doctrine of military necessity has evolved.

The American concept of military necessity was expressed in the instructions prepared by *Franz Leiber* which stated that “military necessity as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and uses of war”.²⁰

The varying concepts of military necessity have never been fully defined and explained in legal terminology. The American Supreme Court, military necessity is “an urgent need, admitting of no delay, for the taking by a commander of measures, which are indispensable for forcing as quickly as possible the complete surrender of the enemy by means of regulated violence, which

¹⁴What is international humanitarian law, ICRC, https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf (last accessed on Aug. 08, 2020).

¹⁵ Aldrich, George H, *The Laws of War on Land*, *THE AMERICAN JOURNAL OF INTERNATIONAL LAW*, vol. 94, no. 1, 2000, pp. 42–63, *JSTOR*, www.jstor.org/stable/2555230. (last Accessed on Aug. 10, 2020).

¹⁶ Supra note 9.

¹⁷ Supra note 13.

¹⁸Downey, William Gerald, *The Law of War and Military Necessity*, *THE AMERICAN JOURNAL OF INTERNATIONAL LAW*, vol. 47, no. 2, 1953, pp. 251–262, *JSTOR*, www.jstor.org/stable/2194822 (last accessed on Aug. 08, 2020).

¹⁹ Ibid.

²⁰Supra note 18.

are not forbidden by the laws and customs of war”²¹.

An urgent need admitting of no delay means that the commander needs to take immediate action in the military situation when the danger is immediate and impending. Measures necessary for the quick surrender of the enemy has different elements in it. Firstly all direct destruction of life of members of the armed forces and of other persons whose destruction is incidentally unavoidable. Secondly, capturing of every armed enemy, of every enemy civilian person of importance and of the public property of the enemy, are authorized measures. Thirdly, the destruction of property, the obstruction of ways of communication, and the withholding of means of life or livelihood from the enemy are authorized measures. Fourthly, the appropriation of whatever the enemy’s country affords for the necessary maintenance and safety of the army is an accepted measure.²²

The most important of all the elements of the definition of military necessity the most important is regulated violence. The term itself sounds self-contradictory. It permits violence but to a limited extent. Regulated violence is generally considered to be a violence that is directed by a superior authority to incapacitate the enemy to the highest possible number but the military effect of which is not disproportionate to the suffering it entails.²³ This definition is a compromise between the conflicting military and humanitarian concepts of the purpose of war²⁴.

An interesting and provocative illustration of the application of the definition of regulated violence arises in a consideration of the question of the use of the explosive bullet. An ordinary semi-automatic pistol of 9mm-caliber bullet fired, has for its military purpose to kill or wound the combatant at whom it has been aimed at. The job is done when it satisfies the purpose of wounding or causing a casualty by the mere penetration of the bullet. The suffering caused by that bullet is not disproportionate to such a military purpose. However, a 9mm caliber explosive bullet, having the same purpose and the same lethal effect, which explodes upon penetration of the body and causes an agonizing and perhaps an incurable wound and multiplies the suffering of the recipient, is something against the humanity principles. The only reason is that

²¹Viola Vincze, *Taming the Untameable: The Role of Military Necessity in Constraining Violence*, ELTE LAW JOURNAL, <https://eltelawjournal.hu/taming-the-untameable-the-role-of-military-necessity-in-constraining-violence/> (last accessed on Aug. 08, 2020).

²²Downey, William Gerald, *The Law of War and Military Necessity*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW, vol. 47, no. 2, 1953, pp. 251–262, JSTOR, www.jstor.org/stable/2194822. (last accessed on Aug. 10, 2020).

²³Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, vol. 37, no. 2, 2007, pp. 177-219, <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1132&context=cwilj> (last accessed on Aug. 06, 2020).

²⁴*Maintaining the Balance Between Military Necessity*, THE LAWYERS CHRONICLE, <https://www.thelawyerschronicle.com/maintaining-the-balance-between-military-necessity-and-humanity/> (last accessed on Aug. 09, 2020).

it serves the purpose of inflicting harm as required but goes beyond it to explode and cause unnecessary pain upon the enemy personnel. Hence, unnecessary infliction of pain or injury or suffering is beyond permission. A very prominent real life example of this type of weapon is the use of pellet-gun in the Kashmir valley.

There are positive laws of war which contain absolute prohibitions. Where such positive rules apply, no plea of military necessity is legally permissible, for example- prohibition of the use of poison, prohibition against the spread of contagious disease etc.²⁵

V. PRINCIPLE OF HUMANITY

The principle of humanity, and its absence during the *Battle of Solferino of 1859*, was the central notion that inspired the founder of the International Committee of the Red Cross (ICRC), Henry Dunant. The principle specifies that all humans should have the capacity and ability to show respect and care for all, even their sworn enemies. Not only for prisoners of war, humanitarian treatment has been lawfully laid down for civilians too. The principles of IHL can be found in all major religions and cultures, set out only basic protections, but ones which look to demonstrate that even during armed conflict there is some common sense of and respect for humanity.²⁶ Modern IHL accepts that harm, destruction and death is necessary and thus lawful during armed conflict but at the same time it looks to limit the harm. The principle of humanity is thus, the heart of this ambition.²⁷

The ICRC commentary to the Geneva Conventions defines humanitarian as “being concerned with the condition of man considered solely as a human being, regardless of his value as a military, political, professional or other unit”, and “not affected by any political or military consideration”. We have already said that IHL is divided into Geneva and Hague Law. Hague Law concerns the conduct of hostilities, codified in a series of declarations and treaties following the first Hague Peace Conference in 1899. The most significant principle of Hague Law is that of Hague Convention IV, Article 22 which says “the right of belligerents to adopt means of injuring the enemy is not unlimited”. From this derives the prohibition of the use of weapons calculated to cause unnecessary suffering or superfluous injury. Under the Geneva Laws, one of the most important articles is the common Article 3, which by the name can be

²⁵ Supra Note 18.

²⁶ *Summary of the Geneva Conventions of 1949 and Their Additional Protocols*, AMERICAN RED CROSS, (Apr, 2011)

https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf. (last accessed on Aug. 09, 2020).

²⁷ *Basic principles of IHL*, Diakonia, <https://www.diakonia.se/en/ihl/the-law/international-humanitarian-law-1/introduction-to-ihl/principles-of-international-law/> (last accessed on Aug. 08, 2020).

guessed that it is common to all the four Geneva Conventions, which prescribes humane and non-discriminatory treatment for the hostilities including members of armed forces.

VI. CONCLUSION

The term “war” has no longer a legal base and is more of a lay man term and has been replaced by the term “armed-attack”. Not all armed conflicts are wars, but all wars are armed conflicts. A balance between military necessity and humanity is found in the core of international humanitarian law. While military necessity is the justification of measures to achieve a military goal provided it goes by the norms of international law, humanity represents the authority to take the edge off pain and sufferings. It commands to save lives, orders for humane treatment and treat individuals with respect. The principle of humanity limits the principle of necessity. There is a very thin line that exists between the principle of necessity and principle of humanity. The moment more harm is caused crossing the boundaries of necessity, the principle of humanity is infringed. Rules of warfare are intended to prevent unnecessary suffering that bring little or no military advantage. The principle of humanity requires that humans be treated humanely at all times be it civilians or soldiers even if they are the greatest enemy, be it from inflicting harm on the enemy to the handing over of the body of the enemy to the correct authority. Military necessity is the exception to the principle of humanity and, principle of humanity is the limitation to the principle of necessity. A proper intrusion into the laws of armed conflict gives us the idea that if all these humanitarian laws were certainly to be followed, no state would have ever resorted to war because being in a state of war deliberately and then abiding by the strict rules of international law to take care of the injured whether defense personnel or civilians would have been a matter of much more trouble and complication than to resolve any matter of dispute at the table tops.
