

## **Chapter Two ■ Sources of International Humanitarian Law**

**Dr. Majed Alhamwi ■**

### **Key words**

International Court of Justice, international conventions , principles, judicial decisions , binding, Hague Conventions, Conduct of Hostilities, Wounded and Sick, Shipwrecked, Weapons, Occupation, Detention, Cultural Property, Naval Warfare, regulation, legal framework, practice, Occupation, civil life, private property, comprise, exception, atrocities.

### **The Sources of International Humanitarian Law ■**

**Since IHL is an integral part of Public International Law, its ■ sources correspond, logically enough, to those of the latter, as they are defined in Article 38 of the Statute of the International Court of Justice.**

**According to Art 38 (1) of the Statute of the International Court ■ of Justice, which is regarded as an authoritative statement of the sources of international law, the Court shall apply:**

- international conventions (please note convention is another ■ word for treaty);**
- international custom, as evidence of a general practice ■ accepted as law;**
- the general principles of law recognized by civilized nations; ■ and**
- judicial decisions and the teachings of the most highly qualified ■ publicists, as subsidiary.**

**Like every branch of law, in order to apply rules, those rules must have a source. For IHL then main sources are customary international law and treaty law such as the Geneva Conventions.**

**In respect to IHL, the most important treaties are:**

- **the Geneva Conventions of 1949,**
- **the Additional Protocols of 1977,**
- **and the so-called Hague Conventions.**

**While treaties are only binding upon parties to a treaty, States can also be bound by rules of customary international law**

- There has been extensive development of legal treaties and ■  
customary practice, which together form an extensive legal  
framework regulating modern conflict. This covers a range of  
issues including:

- Protections of civilians ■
- Prisoners of War; ■
- Conduct of Hostilities ■
- ; Wounded and Sick ■
- ; Shipwrecked ■
- ; Weapons; ■
- Occupation; ■
- Detention; ■
- Cultural Property; and, Naval Warfare. ■

**Treaty Law and International Humanitarian Law ■**

- The four Geneva Conventions of 1949,
- together with the Hague Conventions of 1907
- and customary international law, are the core sources of modern  
international humanitarian law (IHL).

**“Hague Law” and “Geneva Law” ■**

International Humanitarian Law is often broken down into two sub categories, referred to as “Hague Law” and “Geneva Law”.

This division reflects the development of IHL, with Hague Law (through the Hague Conventions of 1899 and 1907) regulating how armies should conduct themselves during hostilities, and the Geneva Conventions regulating issues of protection and how people in your power should be treated.

With the adoption of the Additional Protocols to the Geneva Conventions, which includes extensive regulation of topics traditionally referred to as Hague Law, the separation is less relevant in today’s practice

### **The Hague Regulations and Conventions ■**

The Hague Conventions of 1899 and 1907 and their annexed regulations are a set of conventions primarily regulating the conduct of hostilities. The Conventions represent the basic and commonly accepted rules of engagement – the legal framework covering the means and methods of warfare.

While many of these rules have been updated and improved, especially through the Fourth Geneva Convention and Additional Protocols, they remain a key source of international law, accepted universally as customary international law.

The IV Hague Convention is of particular importance during occupation and sets out a definition of occupation which remains applicable to this day. It also sets out some of the key principles that regulate occupation: namely the obligation to ensure public order and civil life, and obligation to respect of private property.

### **The Geneva Conventions: Historical development and content ■**

The Four Geneva Conventions of 1949 represent the fundamental treaty text regulating issues of protection in situations of armed conflict.

Whilst the Geneva Conventions were collectively codified in 1949, these protections built upon earlier conventions developed in the late 19th and early 20th Century.

With the exception of Common Article Three, the protections afforded under the Geneva Conventions are limited to international armed conflicts.

### **What is the difference between each of the four Geneva Conventions? ■**

-The First Geneva Convention (GCI) provides protection to wounded and sick.

The first Geneva Convention, which comprises a mere ten articles, was adopted in 1864 by twelve nations in order to give protection to wounded and sick soldiers in times of armed conflict on land.

#### **(GCII) ■**

The Second Geneva Convention provides protection to the wounded, sick and

shipwrecked in armed conflicts at sea. -

In 1929, a second treaty was drafted giving protection to the wounded, sick, and shipwrecked in armed conflict at sea. -

#### **(GCIII) ■**

The Third Geneva Convention -

provided protections for Prisoners of War. -

After the atrocities committed against prisoners during the First World War, the international community adopted the third Geneva Convention in 1929 to give protection to the treatment of prisoners of war (POWs).

#### **(GCIV) ■**

The Fourth Geneva Convention provides protection to civilians in armed conflict, including those living under occupation. -

The limitations of the law and of its implementation were starkly - highlighted during the Second World War, and as a result, in 1949 the first three were revised and for the first time a fourth convention was adopted to give specific protection to civilians in armed conflict, including extensive protections to those populations living under occupation.

### **Common Article Three ■**

One key, almost constitutional, provision common to all four Geneva Conventions is Article 3 (Common Article 3), which sets out the fundamental guarantees for all situations of non-international armed conflict. These include the absolute prohibition of murder for those not engaged in hostilities, and the prohibition of torture, mutilation, taking of hostages, execution without proper trial, and all cruel and degrading treatment. In addition, Common Article 3 stipulates that in all circumstances, persons must be treated humanely and impartially and that the wounded and sick shall be collected and cared for.

Common Article 3 is the only article in the Geneva Conventions to provide protections in a non-international armed conflict (NIAC).

### **The First Additional Protocol to the Geneva Conventions ■**

- The First Additional Protocol to the Geneva Conventions of 1977 (API), applicable to international armed conflicts, extends the protection provided to civilians, and also sets out rules on the conduct of hostilities (traditional Hague Law) which defines the lawful means and methods of warfare. For example, API sets out the universally accepted definition of a military object that may be targeted during hostilities.

- The First Additional Protocol also widens the category of conflicts which can be classified as international and hence subject to broader regulation than non-international conflict. These include those “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their self-determination...”

## **The Second Additional Protocol to the Geneva Conventions ■**

- The Second Additional Protocol expands the scope of Common Article 3, and gives additional treaty protection in situations of internal armed conflicts. Like any treaty of international law it only binds those states that have signed and ratified it.

- States that haven't ratified the Second Additional Protocol include the United States of America, China, Russia, Israel, Mexico, Syria, Pakistan and India. Despite these states having not ratified the Protocol some articles are also regarded as international customary law, for example, Article 9 which relates to protection of medical and religious persons.

## **Customary International Law and IHL ■**

- Customary international law (CUIL) is a fundamental source of IHL providing legal protection to cover protection gaps arising from a lack of ratification by states of key treaties, especially in circumstances of internal armed conflict.

- While CUIL is an incredibly important tool of protection during armed conflicts, its limitations are that unlike treaty law the rules are not necessarily written down in a clear and accessible format, and the content of the rules is generally less specific than what you may find in a treaty.

- Yet for practitioners dealing with IHL, the challenge is reduced significantly due to an ICRC commissioned project which identified 161 rules of IHL considered to be customary international law.

## **The Martens Clause ■**

Situations of armed conflict are not exclusively regulated by treaties and custom but by the principles of public conscience and humanity referred to by the Martens Clause.

The Martens Clause was outlined in the preamble of the 1899 Hague Convention and remains a cornerstone of IHL understanding and interpretation to this day.

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the

requirements of the public conscience. -

- In other words the principles of public conscience and humanity should be the guiding notions in framing the appropriate application of international humanitarian law.

# TEXTBOOK ON INTERNATIONAL HUMANITARIAN LAW

by

DR. MAJED ALHAMWI

School of Law

ALSHAM PRIVATE UNIVERSITY

Chapter Three

International armed conflict (IAC) and Non-international armed conflict (NIAC)

## **Qualification of Armed Conflict**

IHL classifies armed conflicts as international armed conflict (IAC) or non-international armed conflict (NIAC)

Qualifying an armed conflict is an important threshold question - necessary to determine which set of rules apply to the conflict: those for IAC (found mainly in the four Geneva Conventions and Additional Protocol I) or those for NIAC (found mainly in Article Three common to the four Geneva Conventions and Additional Protocol II)

Situations of occupation are regulated by IHL, namely the Fourth Geneva Convention and Additional Protocol I

Whether or not an armed conflict is an IAC or NIAC has significant implications. For instance, POW status, as well as combatant status, is found only in the rules applicable to IAC

The rules regulating the conduct of hostilities, as well as humanitarian access and assistance, are more detailed in IAC



This dearth of guidance can pose a challenge because the majority of contemporary conflicts are NIAC. To address this one can look to customary international law, which includes a number of rules that have evolved to address both IAC and NIAC situations

International armed conflicts

International armed conflicts are those in which at least two States are involved

They are subject to a wide range of rules, including those set out in the four Geneva Conventions and Additional

### **.Protocol I**

IHL relating to international armed conflict applies “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them

The same set of provisions also applies “ to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance”. According to traditional doctrine the notion of international armed conflict was thus limited to armed contests between states

### **Non-international armed conflicts**

Non-international armed conflicts are those restricted to the territory of a single State, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other

A more limited range of rules apply to -

internal armed conflicts and are laid down in Article 3 common to the four Geneva Conventions as well as in Additional Protocol II

?When International armed conflict (IAC) occurs

IACs occur when one or more States resort to the use of armed force -  
.against another State

An armed conflict between a State and an international organization is -  
.also classified as an IAC

Wars of national liberation, in which the people of that nation are -  
fighting against colonial domination; and dictatorial regimes or foreign  
occupation with the aims of exercising their right of self-determination,  
.are classified as IACs under certain conditions

(Non-international armed conflict (NIAC

Many current armed conflicts today are non-international in nature. An -  
: NIAC is an armed conflict in which hostilities are taking place between  
the armed forces of a State and organized non-State armed groups, or  
.between such groups

For hostilities to be considered an NIAC they must reach a certain level -  
.of intensity and the groups involved must be sufficiently organized

IHL treaty law has established a distinction between NIACs within the -  
meaning of common Article 3 and NIACs falling within the definition  
.provided in Article 1 of Additional Protocol II

Common Article 3

Common Article 3 applies to “armed conflicts not of an international -  
character occurring in the territory of one of the High Contracting  
”.Parties

These include armed conflicts in which one or more organized non-State  
.armed groups are involved

NIACs may occur between State armed forces and organized non-State -  
.armed groups or only between such groups

## Additional Protocol II

Additional Protocol II applies to armed conflicts “which take place in - the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.

The definition of an NIAC in Additional Protocol II is narrower than the .notion of NIAC under common Article 3

The use of the phrase “global war on terror” resulted in some misunderstanding regarding the application of IHL to certain situations. The “global war on terror” is a political phrase, not a legal term of art. .Thus, the “global war on terror” is not an armed conflict

The appropriate analysis is to look at the conflict locations – Syria, Iraq, Afghanistan, Somalia, Yemen, etc. – and assess each one in terms of whether or not it is an IAC or NIAC, regulated by the relevant framework