
Addressing Modern-Day Armed Conflicts: Is IHL Still Up To the Task?

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Despite a concerning resurgence of international armed conflicts, the majority of conflicts in the world remain non-international armed conflicts, often involving a myriad of non-state armed groups, spilling across borders, and involving foreign states intervening on the side of territorial states or such groups. The Geneva Conventions of 1949 and their Additional Protocols of 1977 were, for the most part, drafted with international armed conflicts in mind. This has led to affirmations that this legal framework is not relevant or provides insufficient regulation for contemporary armed conflicts. This short article briefly outlines why IHL has, in fact, endured over time. Through application by belligerents in the field, jurisprudence, state practice and opinio juris, the development of weapons treaties, complementarity of human rights law, and soft law interpretations and guidance, IHL has developed into a comprehensive protective legal framework. That said, IHL has also faced challenges, and will continue to develop and adapt to the evolving nature of warfare and new technologies, including through treaty-making.

INTRODUCTION

The past decades have seen a significant shift in the way armed conflicts are fought. Most recently, the flaring up of hostilities between

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Armenia and Azerbaijan and between Russia and Ukraine raises concern about a resurgence of armed conflict between states, as observed by some commentators studying tension among a handful of powerful states. Yet, the vast majority of conflicts in the world remain non-international armed conflicts—that is, conflicts involving one or more armed groups. There is no sign of an end to the protracted non-international armed conflicts continuing in Syria, Yemen, Myanmar, Afghanistan, or the Sahel. The International Committee of the Red Cross (ICRC) has legally classified over eighty situations of violence as non-international armed conflicts, involving over sixty states in all regions of the world.

The trends we observe in armed conflicts also continue. Today's protracted conflicts carry the hallmark of elusive peace, such as in the DRC, Afghanistan, Iraq, and Colombia. They frequently involve a multitude of parties—with armed groups continuing to fragment, splinter, and regroup—and states operating through state and non-state proxies at home and abroad. Technology continues to develop apace with cyber operations, autonomous weapons, and the use of outer space raising questions regarding the application and interpretation of IHL.

While contemporary armed conflicts differ from “traditional” interstate wars in many respects, the primary legal framework governing their conduct remains much the same.² International humanitarian law (IHL) rests largely on pillars established in the aftermath of World War II, leading to questions of legitimacy and sufficiency of this dated body of law for today's “new wars paradigm.”³

However, when taking a closer look at the difficulties posed by contemporary warfare, it becomes clear that IHL remains as relevant today as it has always been. While it may not have all the answers to new developments, it “has continued to develop over the past few decades and has been implemented in many ways.”⁴ First, the Geneva Conventions of 1949 and their Additional Protocols of 1977 have stood the test of time as detailed and protective treaties. Second, other treaties (especially regarding weapons), customary law, and jurisprudence have developed substantially, and soft law has complemented these primary sources of international law to form a wide-ranging body of law protecting combatants and civilians and limiting the means and methods of warfare that parties to conflicts employ. Third, other bodies of law, especially human rights law, complement IHL and have also contributed to the protection of people affected by armed conflict. The following will revisit the main sources and milestones in the development of IHL (part 2) that have allowed it to adapt to many, albeit not all, challenges encountered in recent armed conflicts (part 3).

THE CONSTANT DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

Rules limiting warfare and conceptions of what should or should not be allowed during armed conflict have almost always existed everywhere in the world. Modern IHL is an international codification of rules of war that started in the second half of the 19th century, a body of international law that “aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians”⁵ as well as to “limit the effects of armed conflict, notably through restrictions on means and methods of warfare.”⁶

The birth of modern IHL followed the battle of Solferino in 1859, prompting the creation of the Red Cross Movement as well as the first *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, followed by the 1968 *Declaration of Saint Petersburg*, the first of many formal prohibitions of the use of a certain type of weapon in armed conflicts.⁷ Subsequently, the *1899 and 1907 Hague Conventions on the War on Land* and their annexed Regulations further developed the rules regulating the conduct of hostilities between belligerents.⁸

Both the practice of war and IHL have changed greatly since these early codifications.⁹ This is perhaps most notable considering the law of war used to require a declaration of war or recognition of belligerency, making its application dependent on the subjective will of the parties involved.¹⁰ Additionally, it was a body of law almost exclusively applicable to armed conflicts between states.^{11, 12} This changed with the adoption of the four Geneva Conventions in 1949, a major turning point in the evolution of IHL.¹³ Firstly, Article 3 common to the four Geneva Conventions (Common Article 3) introduced legally binding rules applicable to conflicts of a non-international nature, that is, armed conflicts with a non-state armed group on one or both sides—often called civil wars in common parlance.¹⁴ Considering the reluctance of states to regulate “domestic affairs” with international law,¹⁵ the adoption of Common Article 3 must be recognized as a major feat in protecting the victims of all types of hostilities.¹⁶ Common Article 3 remains the central regulation of non-international armed conflicts to this date and constitutes a “minimum yardstick” of “elementary considerations of humanity” that must be respected in all armed conflicts.¹⁷ Secondly, the Conventions expanded the application of IHL such that it is triggered not only by subjective acknowledgements of war but also based on objective assessments of facts. For international armed

conflicts, those between two or more states, IHL now applies once there is a “hostile resort to armed force” or belligerent occupation by one state against the other.¹⁸ For non-international armed conflicts, IHL applies, provided there is a certain degree of intensity of armed violence between sufficiently organized parties.¹⁹ This leaves less room for the parties to the conflict to refuse protection granted to persons affected by armed conflict by either denying the existence of conflict or the applicability of IHL, although this denial is still a frequent phenomenon.²⁰

Aside from these structural changes to IHL, the emphasis of the Geneva Conventions on the protection of victims of armed conflict unequivocally transformed the “law of armed conflict” into “humanitarian law.”²¹ These changes were a clear response to the horrors of World War II, though they were also drafted to address subsequent wars.²² The two Additional Protocols of 1977 built on this response *inter alia* by introducing further rules on certain types of non-international armed conflicts, regulating a new type of “liberation wars” and reflecting rules on the conduct of hostilities.²³

Many of the rules codified in treaties since the conception of modern humanitarian law are also binding on parties to armed conflicts through customary international law. There are also customary IHL norms that are not captured in treaty law, especially in the realm of non-international armed conflicts.²⁴ A comprehensive review of customary IHL can be found in the ICRC’s customary law study.²⁵

The adoption of the Geneva Conventions and their Additional Protocols or the identification of customary IHL rules by the ICRC by no means constitutes an exhaustive history of IHL nor does it mark an endpoint to the development of IHL. Not only have there been new weapons treaties adopted since these milestones, but IHL has always also seen constant adaptations to new and evolving challenges. The decisions of international criminal tribunals,²⁶ human rights bodies,²⁷ and national courts²⁸ demonstrate this shift. Soft law and state practice also keep IHL alive and relevant.²⁹ Based on these developments, the ICRC’s commentaries to the Geneva Conventions provide contemporary interpretations and ensure the faithful application of IHL to today’s armed conflicts.

NEW WARS, NEW CHALLENGES

Most of today’s armed conflicts are of a non-international character, regulated by Common Article 3, Additional Protocol II, relevant weapons-treaties,³⁰ and customary IHL rules of non-international armed conflicts.

Notably, the latter impose largely the same limits to international and non-international armed conflicts, including on the conduct of hostilities, the means and methods of warfare parties employ.³¹ These rules apply to any “new” armed conflict that factually fulfills the required criteria of intensity of violence and level of organization (with the application of Additional Protocol II being more limited).

This being said, it is undeniable that challenges remain in the application of IHL in contemporary warfare. In this short piece, two issues might serve to briefly illustrate how IHL interacts with new developments: the intersection between terrorism, counterterrorism, and IHL; and the development of new technologies of warfare.

Looking at the state of contemporary armed conflicts, the proliferation of non-state armed groups of varying sizes, structures, and capabilities in the past few decades is perhaps its most prominent feature. Almost all these non-state armed groups are designated terrorist groups by states that are in conflict with them, and by regional or international bodies. The post-9/11 period in particular saw an increase in counterterrorism operations against such terrorist groups. This led to calls for new rules to regulate these situations that states considered novel and unprecedented.³² What is more, situations of alliances, coalitions, and splinter groups have made it difficult to determine the relationship between different armed groups and the applicability of IHL on their conflict interactions.³³ Nevertheless, despite the recurring questioning of the applicability and adequacy of existing law, IHL clearly applies to armed groups involved in armed conflicts, even when they are declared to be terrorist, and to counterterrorism operations undertaken against them in the context of an armed conflict.³⁴ In this regard, it is important to emphasize that the applicability of IHL does not confer any legitimacy on armed groups bound by it.³⁵ When it comes to counterterrorism operations that occur in situations below the threshold of IHL, states need to rely on and abide by the means of law enforcement found in human rights law instead.³⁶ As the UN Security Council has demanded, States “must ensure that all measures taken to counter terrorism...comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law.”³⁷

Modern-day armed conflicts also involve modern-day technology, with particular developments in cyber operations and new technologies including artificial intelligence and weapon systems. Can IHL, a body of law that has arguably not seen a “major update of the rules” since 1977,³⁸ provide the necessary answers to problems that it could have not foreseen? At the outset, it should be recalled that, as the International Court of

Justice has stated, the established principles and rules of IHL applicable in armed conflict apply “to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.”³⁹

Looking first at so-called cyber warfare, the ICRC, experts, and states hold the view that international law can apply to the realm of cyber space, with IHL’s rules on the conduct of hostilities applying to cyber-attacks conducted in the context of armed conflicts and protecting against the human cost of cyber operations.⁴⁰ This is important, considering that cyber operations can indeed “pose a particular threat for certain elements of civilian infrastructure,” especially the health-care sector.⁴¹ Naturally, the addition of a new dimension to armed conflict has brought about a number of questions that still require clarification, and the question whether new law is needed to limit the potential human cost of cyber operations in armed conflict depends, in part, on the willingness of states to clarify these questions.

Secondly, an area which does require further development is the development of autonomous weapons systems. The emergence of new autonomous technologies applied to military uses has sparked grave concern over the risks of autonomous weapons replacing human judgment and controlling decisions over life and death. The fundamental challenges autonomous weapon systems (AWS) pose for compliance with IHL as well as their ethical implications have prompted the ICRC to call for the adoption of new rules.⁴² Without prejudice to the applicability of IHL to all new weapons used in armed conflicts and the fact that it does impose limits even on the use of AWS,⁴³ recognizing that the IHL does not have all the answers to these new challenges is crucial for continuing to develop the legal framework and ensuring the protection of persons affected by novel developments in warfare.

CONCLUSION

“Traditional forms of armed violence...still affect the greatest number of victims”⁴⁴ and the cardinal challenge to modern IHL is one that has similarly existed since its conception: the lack of respect for the rules.⁴⁵ This is exacerbated by two major factors, namely the lack of systematic implementation mechanisms⁴⁶ and the lack of a nuanced discourse on the effectiveness of IHL. Excessive mediatization of IHL violations often fails to adequately represent the daily instances of respect for IHL and misrepresents the reality of contemporary armed conflicts. This is not only dangerous for the perception of IHL, it also “renders violations banal and risks creating an environment where they may become more acceptable.”⁴⁷

Recognizing the continued relevance of IHL in contemporary warfare is essential for the protection of affected people, especially considering the reluctance to adopt or create new legally binding rules in its place.⁴⁸ Attempts at overhauling the universally accepted balancing exercise between military necessity and humanity are unlikely to result in a similarly or more protective outcomes. Nonetheless, it remains important not to overstretch the applicability of IHL by applying it to situations for which it was not intended or developed.⁴⁹ Where IHL does not apply, international human rights law and domestic law provide protective legal frameworks. Accordingly, the application of IHL must be conducted on a case-by-case assessment, remaining cognizant of the importance of IHL, its limits and the fact that situations outside of armed conflicts are not devoid of applicable legal frameworks either.⁵⁰*f*

ENDNOTES

- 1 I would like to thank Florentina Pircher for her precious help in drafting this article.
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- 3 Heike Krieger, and Jonas Püschmann, *Law-making and legitimacy in international humanitarian law* (Cheltenham, UK & Northampton, MA, USA: Edward Elgar, 2021), 3.
- 4 *International humanitarian law and the challenges of contemporary armed conflicts: recommitting to protection in armed conflict on the 70th anniversary of the Geneva Conventions*, 2019 Challenges Report, ICRC ref. 4427, 77.
- 5 “War and international humanitarian law,” ICRC, 2010, <https://www.icrc.org/en/doc/war-and-law/overview-war-and-law.htm> (accessed March 14, 2022).
- 6 Kathleen Lawand and Isabel Robinson, “Development of Treaties Limiting of Prohibiting the Use of Certain Weapons: The Role of the International Committee of the Red Cross,” in Robin Geiss, Andreas Zimmermann and Isabel Robinson (eds), *The International Committee of the Red Cross’ Influence on Related Areas of International Law* (Cambridge: Cambridge University Press, 2017), 141-184, 179.
- 7 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949*, 75 UNTS 31; *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, Saint Petersburg, November 29/December 11, 1868.
- 8 *Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, July 29, 1899; *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, October 18, 1907; *See also Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*, Geneva, June 17, 1925; *Convention relative to the Treatment of Prisoners of War*, Geneva July 27, 1929.
- 9 Robert Kolb, “The main epochs of modern international humanitarian law since 1864 and their related dominant legal constructions,” in Kjetil Mujezinovic Larsen, Casimilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a ‘Principle of Humanity’ in International Humanitarian Law* (Cambridge: Cambridge University Press, 2012),

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- 10 Kolb, 31-32, 48.
- 11 Although there had existed attempts to regulate “internal strife” such as the 1928 Convention on Duties and Rights of States in the Event of Civil Strife, ad hoc agreements and unilateral commitments or instructions such as the Lieber Code.
- 12 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), 9-29.
- 13 *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, August 12, 1949; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, Geneva, August 12, 1949; *Convention (III) relative to the Treatment of Prisoners of War*, Geneva, August 12, 1949; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, Geneva, August 12, 1949; Kolb, 45.
- 14 ICRC, *Commentary on the First Geneva Convention*, 143.
- 15 Sivakumaran, 2012, 9-10.
- 16 Kolb, 33.
- 17 ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgement, 1986, paras 218-219.
- 18 Common article 2 to the four Geneva Conventions; ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the treatment of prisoners of war, 2nd edition* (Cambridge: Cambridge University Press, 2021), 92-94; Kolb, 32, 49-50.
- 19 Common article 3; ICTY, *Haradinaj* Trial Judgement, 2008, para. 49, 60, 90-99; ICRC, *Commentary on the Third Geneva Convention*, 88-102.
- 20 Kolb, 33.
- 21 Kolb, 45.
- 22 Boyd van Dijk, *Preparing for War: The Making of the Geneva Conventions*, OUP 2022.
- 23 *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977, specifically article 1(4); *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977.
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- 25 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).
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- 30 See for example *Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention)*, November 28, 2003, expressly stating that it applies to all parties to an armed conflict.
- 31 ICRC, *Commentary on the First Geneva Convention*, 141.
- 32 Krieger and Püschmann, 3; Jakob Kellenberger, “Sixty years of the Geneva Conventions: learning from the past to better face the future,” *Ceremony to celebrate the 60th anniversary of the Geneva Conventions* (2009), <https://www.icrc.org/en/doc/resources/documents/statement/geneva-conventions-statement-president-120809.htm>; John B. Bellinger III and Vijay M. Padmanabhan, “Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law,” *The American Journal of International Law* 105 (2) (2011): 201-243.
- 33 ICRC, 2019 Challenges Report, 50; The proliferation of non-State armed groups also sparked an ICRC report to the International Conference of the Red Cross and Red Crescent, calling for the strengthening of IHL of non-international armed conflicts in several aspects; 31st International Conference of the Red Cross and Red Crescent, *Strengthening Legal Protection for Victims of Armed Conflicts*, 2011, <https://www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf>.
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- 35 Common article 3, para. 4; ICRC, *Commentary on the Third Geneva Convention*, 313.
- 36 In either situation, domestic law and international criminal law are also relevant; ICRC, 2019 Challenges Report, 51, 59.
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- 42 ICRC, *ICRC position on autonomous weapon systems*, May 12, 2021, <https://www.icrc.org/en/document/icrc-position-autonomous-weapon-systems>; “Government commits to international effort to ban and regulate killer robots,” New Zealand Government, Press Release, November 30, 2021, <https://www.beehive.govt.nz/release/government-commits-international-effort-ban-and-regulate-killer-robots>; UN Secretary General, “Secretary-General’s message to the Sixth Review Conference of High Contracting Parties to the Convention on Certain Conventional Weapons,” December 13, 2021, <https://www.un.org/sg/en/node/261134>; International Joint Conference on Artificial Intelligence, “Autonomous Weapons: An Open Letter from AI & Robotics Researchers,” July 28, 2015, <https://futureoflife.org/2016/02/09/open-letter-autonomous-weapons-ai-robotics/?cn-reloaded=1>.
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- 45 ICRC, 2019 Challenges Report, 72.
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- 47 ICRC, 2019 Challenges Report, 76-77.
- 48 Droege and Giorgou, 31-32; Dinstein, 6.
- 49 ICRC, *Commentary on the First Geneva Convention*, 142.
- 50 *Ibid.*, 151.