CHAPTER ONE: Introduction to International Humanitarian Law (IHL)

1.1 Concept and purpose of International Humanitarian Law

War is usually characterized by outbursts of primitive raw violence. When States cannot or will not settle their disagreements or differences by means of peaceful discussion, weapons are suddenly made to speak. War inevitably results in immeasurable suffering among people and in severe damage to objects. War is by definition evil, as the Nuremberg Tribunal set forth in its judgment of the major war criminals of the Second World War. The United Nations Charter has also expressly dealt with the exceptional circumstances under which states are allowed to use force, and it in principle prohibits war and even prohibits the threat to use force against the territorial integrity or political independence of any State.

Yet, States continue to wage wars, and groups still take up weapons when they have lost hope of just treatment at the hands of the government. And it has also been laid down that no one would condemn a war waged, for example, by a small State protecting itself against an attack on its independence, □war of aggression□ or people rebelling against a tyrannical regime.

International humanitarian law is mainly concerned with the fate of those who are not taking part in the conflict and sets forth a set of rules which seek, for humanitarian reasons, to limit the **effects of armed conflict.** It protects persons who are not or no longer

participating in the hostilities and restrict the means and methods of warfare.

International humanitarian law is apart of international law, which is the body of rules governing relations between states. However what is special about international humanitarian law is that it applies to armed conflicts. It doesn't regulate whether a state may actually use force as it is governed by an important but a distinct part of international law set out in the United Nations Charter.

International humanitarian law, also called the law of armed conflict and previously known as the law of war, is a special branch of law governing situations of armed conflict, in a word war. International humanitarian law seeks to mitigate the effects of war, in that it limits the choices of means and methods of conducting military operations. This body of rules also obliges the belligerents to spare persons who do not or no longer participate in hostile actions in the course of conducting armed conflict.

War is, basically, prohibited under existing international law, with the exception of the right of every State to defend itself against attack. The fact that international humanitarian law deals with war does not mean that it lays open to doubt the general prohibition of war. And for this it suffices to see the Preamble to Additional Protocol I to the Geneva Conventions on the relationship between the prohibition of war and international humanitarian law. This document provides:

> *Proclaiming their earnest wish to see peace prevail among peoples, recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force*

Believing it necessary, nevertheless, to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations

The above statements in the preamble clearly denote that international humanitarian law quite simply stands mute on whether a

State may or may not have recourse to the use of force. It does not itself prohibit war, rather it refers the question of the right to resort to force to the constitution of the international community of states as contained in the United Nations Charter. International humanitarian law acts on another plane. That is, it is applicable whenever an armed conflict actually breaks out, no matter for what reason. Only facts matter; the reasons for the fighting are of no interest to the rules of international humanitarian law to apply. In other words, international humanitarian law is ready to step in, whenever war breaks out, whether or not there is any justification for that war.

International humanitarian law, which is part of universal international law, has the purpose of ensuring peaceful relations between and/or among peoples. It makes a substantial contribution to the maintenance of peace in that it promotes humanity in time of war. It aims to prevent or at least to hinder mankind's decline to a state of complete barbarity.

From this point of view, respect for international humanitarian law helps lay the foundations on which a peaceful settlement can be built once the conflict is over. The chances for a lasting peace are much better if a feeling of mutual trust can be maintained between the belligerents during the war. By respecting the basic rights and dignity of man, the belligerents help maintain that trust.

Review Questions

☻ What is International Humanitarian Law and what is it that it is concerned with?
☻ What is the position of IHL with regard to the legitimizing of war?

1.2 Historical Development and Philosophy of International Humanitarian Law

In dealing with the concept of international humanitarian law, it was stated that it is principally concerned with limiting the effects of armed conflict. From a historical and philosophical perspective also there are many scholars who have dedicated their time and efforts to trace the very incident that gave rise to the idea of controlling war. One of the most notable ones is Clausewitz, who was once a practical soldier and politician and whose works will be considered briefly herein below.

The idea of controlling of war is said to be as old as war itself. Clausewitz, when addressing the very concept of war itself, is said to

have spoken with two voices: on the one hand, stigmatizing the notion of controlling war as leading to □logical absurdity□; on the other, actually writing about the conduct of war as if it were susceptible to control. All best contemporary commentators on Clausewitz □Aron, Galline, Paret, and Howard himself-find it possible to explain the two voices as echoes of an ambiguous belief that war, although peculiarly difficult to control, was in principle controllable and that in many circumstances it could be controlled. The ancient idea could retain credibility because circumstances continued to support it, and so long as that was the case Clausewitz could justifiably retain his preeminence as the arch-philosopher of war. But, what if circumstances should have changed to an extent that makes the idea, at least in part, incredible? Howard, another notable writer on the control of war, himself goes on to acknowledge that post-1945 circumstances have done precisely that war is not so much the continuation of politics, but their bankruptcy.

Ambiguity and contradiction are not singular to Clausewitz,. They mark in general the whole of Europe-based philosophy of war, which is founded in the reconciliation of the principles of military necessity and humanitarian concern. Its story can be read as the record of a never-ending dialectic between an idea, which is, of course, full of contradictions, and circumstances (cultural, ideological, political, or whatever) which are sometimes conductive to it but sometimes so discouraging. And yet, they all have never despaired altogether any more than believing men have ever, even in darkest times, abandoned the hope of salvation. The idea of controlling and restraining war has survived and is alive and well in the world today. It even goes back time out of mind and is said to be even as old as war itself. Consequently, killing became differentiated, and one kind was called murder; war was perfected though it could bring an uneasy

conscience. The will to brotherhood and harmony also existed but was at odds with the will to competitiveness and aggression.

Scholars narrate the historical development of international humanitarian law by dividing it into different stages. The first stage is given a name 'early plan for peaceful order'. Abhorrence of war and with it the making of plans for its abolition, prevention, or limitation is said to be an old-age aspect of man's confused and ambivalent thinking about war; an aspect which for the most part fitted snugly within those streams of religious and political thoughts classified under the heads of utopias, pacifism, and the perfectibility of man. Indeed, it must be admitted that a particular European sub-set of plans for the establishment of a peaceful international order from Dante and Marsilius of Padua through Dubois, Cruce, Sully, Penn, Saint-Pierre, and Rousseau to Kant have often been and still often are presented as heartening precedents of some particular value, demonstrating that the twentieth century's endeavors in this direction have more solid foundations than simply utopian aspiration.

From all those earlier centuries of thought and planning about the control of war, there is an important and unbroken stream whose relevance to practicability was never doubted and whose particular and unique idea was rooted in circumstances where it directly made sense: the idea of restraint and self-respect in the conduct of war. These ideas have turned up in most civilizations and societies gradually.

The second period in war controlling endeavor is the one that covers the years from the second half of the 19th and early 20th century. In this period, this optimistic reading of war achieved very wide acceptance. At the same time, the development of international

organization and of public international law were being read as elements of that overall progress in condition of mankind which the majority of inhabitants of the imperial powers took for granted. And the realm of war was one of those over which progress was believed to and women active in various branches of the Peace Movement showed progress in the laying of foundations for demilitarization, disarmament, and the non-violent resolution of inter-state conflicts. For men untouched by the peace Movement and wedded still to the cult of war, showed progress in the applications of science and industry which might make wars more intense and lethal but would, they believed, make them decisive and short. This can be easily noticed from the maxim dear to such war saying "short and sharp wars are the most humane". For people in between, to whom the peace people appeared impractical and the War people insensitive, progress showed most persuasively in the development of international law and "the public conscience"; a law and an ethic which would work together to impose humanitarian restraints and prohibitions on the conduct of war and to keep it as it is supposed to be relatively better.

So much of a war-controlling kind was proposed to be done in this historical period, and enough actually was said to have been done, for the record of those years to serve as a kind of compendium of ideas and illustrations covering all branches of our subject matter, i.e. humanitarian restraint. Obviously, the ideas for the most part were far from new but they were activated now in circumstances sufficiently like those of our own times to justify our regarding them as a stepping stone for what was to come later.

The next important event in the history of international humanitarian law is disarmament or as defined by the scholars "arms control"

movement. This, broadly understood, was said to be one of the principal war controlling endeavors of the 19th century. Among the most significant ones, disarmament proposals of one sort or another were put forward by Russia in 1816, 1859; and 1899; by France in 1863 and 1877; Britain in 1866, 1870, and 1890; Denmark in 1893. It has also been said that nothing like them had been herd of before. But to ones dismay, none of them got anywhere. Each of course has its own particular explanation and is grounded in the political circumstance of the time and the proposers sense of occasion. One may, however, dare to offer some general explanations without greatly endangering historical truth.

The spirit of this particular period was receptive to such schemes and not through the medium of public opinion alone. Some of those schemes were floated in the normal confidentiality of top-level diplomatic discourse; whatever interests the proposers had at heart, they did not always include mass popularity or the satisfaction of pressure groups. Something in the spirit of the age was encouraging to the idea of disarmament. Besides the rampant nationalism and imperialism and pure Biblicism which excited the minds of men from the cottage to the throne, there were also certain preferences for peace and revulsions from war.

Disarmament had other attractions of a more prudential and self serving nature too. Armaments and armed forces cost money. Wars that paid for themselves had always been exceptional. By the late nineteenth century, the costs of military preparedness were becoming fearsome, and part of the public mind was interested in reducing them. Except the German government of 1899 which denied that fact and proclaimed saying their people were perfectly happy to pay for all the armaments, every government admitted that they felt the

pressures of military expenditure and were aspiring the pleasure of release from them.

Alexander, who was mindful of all the problems of the time relating to disarmament, in 1816 proposed a great idea of a simultaneous reduction in the armed forces of all kinds, which the powers have brought into being to preserve the safety and independence of their peoples. Though this is said to be a wonderful proposal it was weakened by the reluctance of countries especially Russia that had not, since the return of peace, reduced their forces.

Another principal war-controlling endeavor of the nineteenth century other than disarmament, was arbitration although it was admittedly said to be stretching things a bit to include among ways of controlling war a way of avoiding it. Some elements of the peace movement favored one, some the another, but almost always, i.e. disarmament and arbitration go, hand in hand in that the former strives to reduce the ability to fight wars and to remove the pressures and inducements thereto; and the latter, to resolve international conflict by peaceful and rational means instead of by violent and uncontrollable means. Like disarmament, the idea of arbitration could be traced back ever so far to the years before Christ. Unlike disarmament, it could, however, boast of a respectable history of modest practical achievements through many ages and phases of civilization. As the well known historian Fried, cited these impressive figures cover from 1844 to 1860, 25 arbitration treaties; 1861 to 1880,54,1881 to 1900, 111. In all, 212 arbitral awards made in the course of the century, and all of them, he claimed, carried out in good faith. After 1900, the rage for arbitration only grew fiercer in the heydays of The Hague and Geneva.

But from our point of view, as from that of any serious historian of international relations, all those figures of treaties, awards and settlements add up to very little because it was either the settlement of disputes between small states, often under the admonitory eye of a regional hegemonies as was especially likely to be the case among Members of the Pan-American Union; or the only few cases which catch a realist□s eye, disputes which great powers could have got heated about but which one or another of the parties decided to cool down.

Disarmament and arbitration were both major preoccupations of The Hague Conferences of 1899 and 1907. It is also equally important and necessary to wheel back fifty years and say few words on the other half of the war-controlling story which also proved to be big at The Hague the laws and customs of war. These had origins as ancient and basic as the ideas of disarmament, arbitration, and so on, and over the ages achieved a firmer foothold than them in the war practices of mankind. This had not been done without sacrifices. In its historic origins, the law of war meant what law had to say about going to war in the first place as well as what it said about how to conduct a war once you were in it.

The other very important events in the history of international humanitarian law are the two Conferences held at The Hague in 1899 and 1907. Both Conferences were known as pace Conferences but it was only the 1899 one that grappled with the roots of the problem, so far as that was one of armaments, armed strengths, and an arms race running beyond control. Disarmament had a much more tenuous place on the agenda for 1907, where it was only briefly touched upon. In 1899, it was the heart of the matter, a strident call on the diplomatic resourcefulness of the participants and source of excitement to the peace movement□s observers, a vocal vanguard of whom moved into

the city for the Conference□s duration, rejoicing to regard it as □the parliament of peace□. With their relentless lobbying and acclamation as an ever-present reminder of the interest the self-styled civilized world was focusing upon, the delegates in charge of negotiating had to move cautiously.

But for those who watched what they did rather than what they said, the direction of their movement was never in doubt; it was towards rejection of every disarmament proposal that did not promise to leave their own countries in a relatively improved position vis-a- vis the rest; which meant, of course, that since every country hoped that others would be as slow to notice its own self-interest as it was quick to notice the self-interest of others, no progress was made towards disarmament at all. The conference ended with no more than this uncontroversial declaration that □the limitation of military expenses, which presently weigh heavy on the world, is much to be desired for the sake of both material and moral development of humankind□ .

Though the entire endeavor to realize the taking of practical steps towards disarmament in the conference couldn□t be successful, the Hague Peace Conferences are not to be sneered at because they made the first steps down many war-controlling roads which are still being traveled on in our own times. Some of the thirteen Conventions instituted in 1907 also remain basic to our contemporary law of war, peace, and neutrality. On the other hand the Land War Regulations together with their updating of the Geneva Conventions, were a landmark of humanitarian law. But the Conferences□ failure was almost complete in respect of their announced purposes of disarmament and arms control.

The next important event that comes into picture in the history of international humanitarian law is the post-world war II circumstance. The UN is a post-1945 circumstance which makes a big mark. Its predecessor, the League of Nations, also made a mark for a few years but it did not last. The control of war by one means or another was the League□s *raison d□etre*, and the more that *raison d□etre* was frustrated, the lower the League sank towards its tragic and humiliating grave. The case of the UN is quite different. Disarmament, not initially one of its main purposes, early becomes one in proportion with the evaporation of optimism as to its peace-keeping capabilities. Because too much was not hoped for too long, failure to achieve much in the war-controlling line has not been too disappointing. But apart from that, the UN just simply is there and is in many ways useful. It is the world□s central mart and exchange for the transaction of much international business. It has sunk roots, as the League never did. Although one might argue that endless talk cannot actually do much good for arms control and other means of controlling war, one can just as well argue that the important issues are better talked about too much than not talked about at all.

Not so much may be new since the World War II, as we supposed. What is unquestionably new since then, however, is the question of nuclear weapons. But there are limits to the newness of the terms of the debate which we conduct about them. What States can do with nuclear weapons is no doubt, new; but deciding whether to do it or not invokes no new ideas, runs into no new difficulty unless it relates to a raising of the alleged primacy of scientific and technical factors to a new height.

The law of war has since then, between 1945 and 1980, gone through a second phase of □reaffirmation and development□; and it is much more concerned than it had ever been before with the protection of □civilians□.

That, in deed might be thought to have become its main business- reasonably enough, considering how the ration of civilian to military losses has risen in the wars of our century, and how frightful civilian sufferings often are-and that must be its chief attraction to the civilian mind. It offers-within the legal meaning of the technical term, "protection" which is likely to encourage the civilian to think he can be protected from the horrors of war and to feel indignant when he is not.

Generally speaking, in the history of international humanitarian law, powerful lords and religious figures, wise men and warlords from all continents have since time immemorial attempted to limit the consequences of war by means of generally binding rules. But, it would make our discussion of the history of international humanitarian law incomplete if we don't see what Henry Dunant and Francis Lieber have done for today's universal and for the most part written international humanitarian law in the 19th century in Europe. Both of whom were marked by a traumatic experience of war and at almost the same time, but apparently without knowing of each other's existence, made essential contributions to the concept and contents of contemporary international humanitarian law. The important contribution of these two figures is not of course inventing protection for the victims of war, rather they are known for expressing an old idea in the form adapted to the contemporary world.

Dunant and Lieber both built on an idea which is a pillar to the basic rules of humanitarian law based on what is put forward by Jean-Jacques Rousseau in The Social Contract, which appeared in 1762. The idea used as a basis for the rules on humanitarian law is that "War is in no way a relationship of man with man but a relationship between States, in which individuals are only enemies by accident, not

as men, but as soldiers□□ Rousseau continued, logically, that soldiers may only be fought as long as they themselves are fighting. Once they lay down their weapons ,□they again become mere men□ and hence their lives must be spared. Rousseau in this statement, thus, summed up the basic principle underlying international humanitarian law, i.e. that the purpose of a bellicose attack may never be to destroy the enemy physically. In so doing he lays the foundations for the distinction to be made between members of a fighting force, the combatants, on the one hand, and the remaining citizens of an enemy State, the civilians not participating in the conflict, on the other.

The use of force is permitted only against the combatants, since the purpose of war is to overcome enemy armed forces, not to destroy an enemy nation. And hence force may be used against individual soldiers only so long as they put up resistance. Any soldier laying down his arms or obliged to do so because of injury is no longer an enemy and may, therefore, no longer be the target of a military operation. It is in any case pointless to take revenge on a simple soldier, as he cannot be held personally responsible for the conflict.

Henry Dunanat, who is said to have built the intellectual foundation for the rebirth of international humanitarian law in the 19th century, has also made a notable contribution through his book □A Memory of Solferino□. In this writing, he did not dwell so much on the fact that wounded soldiers were mistreated or defenseless people killed. He was deeply shocked by the absence of any form of help for the wounded and dying. He, therefore, proposed two practical measures calling for direct action: an international agreement on the neutralization of medical personnel in the field, and the creation of a permanent organization for practical assistance to the war wounded.

The first led to the adoption in 1864 of the initial Geneva Convention whereas the second saw the founding of the Red Cross.

This material was revised in 1906 on the recommendation of the ICRC and on the basis of the experience of several wars. The First World War was a serious test for the law of Geneva, and resulted in a further revision in a serious test for the law of Geneva, and resulted in a further revision in 1929. Four years after the end of the Second World War, on 12 August 1949, the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was adopted..

A Convention adopted at the 1899 Hague Peace Conference placed the victims of war at sea under the protection of the law of Geneva. A revised version of the Convention was adopted at the 1907 Hague Peace Conference, and later became the present or the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of armed Forces at Sea

The Hague peace conference also examined another topic on the treatment of the prisoners of war. The 1899 and 1907 Conventions on the Laws and Customs of War on Land contained some provisions on the treatment of prisoners. On the basis of the experience of the First World War, one of the two 1929 Geneva Conventions consisted in fact in a Prisoner-of-War Code, which in turn was also developed after the Second World War. The (Third) Geneva Convention relative to the Treatment of Prisoners of War (of 12 August 1949) remains in force to this day. In addition, there is a fourth Geneva convention and two additional protocols known as protocols additional to the Geneva conventions as the instruments setting down the rules of contemporary international humanitarian law

Review Questions

☻ What is the idea of scholars on the idea of control of war?

☻ Briefly describe the stages in the development of IHL? What is the significance of each to the development of IHL?

☻ What is the idea proposed by H. Dunant that formed the basis for the rules of IHL?

☻ Can you elaborate on the contribution of H. Dunant and his book 'A Memory of Solferino'? What makes him a very notable person in the history of IHL?

☻ What do you know about The 1899 Hague Peace Conference?

1.3 The Distinction between *JUS AD BELLUM* (Legality of the use of force) and *JUS IN BELLO* (Humanitarian rules to be respected in warfare)

Throughout history, whenever states and/or peoples have taken up arms, they have asserted that they were doing so for a just cause. All too often this argument has been used to justify refusing their opponents any mercy. In fact, history shows that the more the belligerents insist on the sanctity of their reasons for resorting to armed force, the more those same reasons are used to justify the worst excesses. The crusades and the wars of religion, alas, left a long trial of atrocities in their wake.

It was only when war was recognized as a very imperfect means of settling a dispute between two sovereigns that states began to accept the idea of limiting armed violence. The emergence of nation states

and the development of professional armies led states to gradually accept a body of rules intended to limit the horrors of war and to protect its victims. For a long time, these rules remained customary in nature; they began to be codified in the mid-Nineteenth Century.

International Humanitarian Law developed at a time when the use of force was a lawful form of international relations, when states were not prohibited to wage war, when they had the right to make war, meaning, when they had the *Jus* ad bellum. There was no logical problem for international law to prescribe them the respect of certain rules of behavior in war called the *jus* in *bello* if they resorted to that means.

Today the use of force between states is prohibited by a peremptory rule of international law. This has made the *jus* ad bellum to change into a *jus* contra *bellum*. Exceptions to this prohibition are admitted in case of individual and collective self-defense, Security Council enforcement measures, and arguably to enforce the right of peoples to self-determination or national liberation wars. Logically, at least one side of an international armed conflict is, therefore, violating international law by the sole fact of using force, however respectful of IHL. All municipal laws of the world equally prohibit the use of force against governmental law enforcement agencies in the case of non-international armed conflict.

Although armed conflicts are prohibited, they happen, and it is today recognized that international law has to address this reality of international life not only by combating the phenomenon, but also by regulating it to ensure a minimum of humanity in this inhumane and illegal situation. However, for practical, policy, and humanitarian reasons, international humanitarian law has to be the same for both

belligerents: the one resorting lawfully to force and the one resorting unlawfully to force. From a practical point of view, the respect of international humanitarian law could otherwise not be obtained, as, at least between the belligerents, it is always controversial as to which belligerent is resorting to force in conformity with the *jus ad bellum* and which violates the *jus* contra *bellum*. In addition, from a humanitarian point of view, the victims of the conflict on both sides need the same protection, and they are not necessarily responsible for the violation of the *jus ad bellum* committed by their party.

International Humanitarian Law has, therefore, to be respected independently of any argument of *jus ad bellum* and has to be completely distinguished from *jus ad bellum*. Any past, present, and future theory of just war only concern *jus ad bellum* and cannot justify that those fighting a just war have more rights or less obligations under international humanitarian law than those fighting an unjust war.

This complete separation between *jus ad bellum* and *jus* in *bello* has been recognized in the preamble of protocol I which reads:

> The High Contracting Parties,
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> *Proclaiming their earnest wish to see peace prevail among peoples, Recalling that every state has the duty, in conformity with the charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations*

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this protocol must be fully applied in all circumstances to all persons who are protected by those instruments without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict.

(…)

This complete separation between *jus ad bellum* and *jus in bello* implies that international humanitarian law applies whenever there is de facto armed conflict, however that conflict can be qualified under *jus ad bellum*, and that no *jus ad bellum* arguments may be used in interpreting international humanitarian law. It also, however, implies, for the drafting of rules of international humanitarian law, that they may not render the *Jus ad bellum* impossible to be implemented, e.g., render efficient self-defense impossible.

There are also some writers who do not confine themselves to just showing the distinction between *jus ad bellum* and *jus in bello* and who go further and even assert the autonomy of *jus in bello* with regard to *jus ad bellum.* Under the terms of the Pact of Paris, the contracting states declared that they condemned recourse to war for the solution of international controversies, and renounced it as an

instrument of national policy. As has been noted herein above the United Nations Charter has prohibited any recourse to force in international relations with few exceptions.

That being the case, the following question arises: Is the fact that a belligerent has resorted to armed force in violation of international treaties and commitments an obstacle to the application of *jus in bello*? Two possibilities may be envisaged:

I) Either the war of aggression is deemed to be the international crime *par excellence*, a crime which subsumes all others and which therefore cannot be regulated, in which case the laws and customs of war do not apply to either of the belligerents; or

II) The aggressor alone is deprived of the rights conferred by *jus in bello,* whereas all his obligations under this law remain unchanged, while the state which is the victim of the aggression continues to enjoy all the rights conferred by *jus in bello* without incurring any obligations.

The first hypothesis is only one that draws all the logical conclusions from any subordination of *jus in bello* to *jus ad bellum*. It must nevertheless, be rejected out of hand, for it would lead to unbridled violence. The consequence of an abdication of the rule or law, that solution would produce absurd and monstrous result.

The second solution entails a differentiated application of the laws and customs of war, but it must be rejected just as vigorously as the first, for in practice it would produce the same result. In the absence of a mechanism to determine aggression and to designate the aggressor in every case and in such a way as to be binding equally all belligerents, each of the latter would claim to be the victim of

aggression and take advantage of this to deny his adversary the benefits afforded by the laws and customs of war. In practice, therefore, this solution would lead to the same result as the hypothesis whereby wars of aggression cannot be regulated: a surge of unchecked violence. The autonomy of jus in bello with regard to *jus ad bellum* must therefore be preserved. This conclusion had already been clearly demonstrated by Emer de Vattel (1714-1767):

> *War cannot be just on both sides: One party claims a right, the other disputes the justice of the claim; one complains of an injury, the other denies having done it. When two persons dispute over the truth of a proposition it is impossible that the two contrary opinions should be at the same time true. However, it can happen that the contending parties are both in good faith; and in a doubtful cause it is, moreover, uncertain which side is in the right. Since, therefore, Nations are equal and independent, and can not set themselves up as judges over one another, it follows that in all cases open to doubt the war carried on by both parties must be regarded as equally lawful, at least as regards its exterior effects and until the cause is decided.*

Thus, Vattel does not expressly reject the doctrine of just war, developed by the fathers of the Church, but puts it into perspective and draws its sting.

The autonomy of *jus in bello* with regard to *jus ad bellum* was confirmed after the Second World War by the Charter of Nuremberg Tribunal, which made a distinction between war crimes, that is, acts committed in violation of the laws and customs of war, and crimes against peace. This distinction was confirmed by the practice of the Tribunal. Indeed, the Tribunal scrupulously respected the distinction

between crimes against peace, on the one hand, and war crimes, on the other; it assessed the intrinsic unlawfulness of war crimes against the laws and customs of war, regardless of the fact that the crimes concerned had been committed during a war of aggression. By acknowledging that the laws and customs of war could be invoked not only by the prosecution but also by the defense for the accused, the Tribunal unequivocally confirmed the autonomy of *jus in bello* with regard to *jus ad bellum.* The great majority of national tribunals entrusted with the task of judging war crimes committed during the Second World War upheld this distinction.

The Geneva Conventions of 12 August 1949 doubly confirmed the autonomy of *jus ad bellum.* First, in Article 1 common to the four Conventions, the High Contracting parties undertake to respect and ensure respect for these instruments in all circumstance. There can be no doubt that in adopting this provision states ruled out the possibility of invoking arguments based on the legality of the use of force in order to be released from their obligations under the Conventions.

Secondly, the Conventions prohibit any reprisals against persons or property protected by their provisions. Obviously, any state using the argument that it is the victim of a war of aggression to justify its refusal to apply humanitarian law to enemy nationals would be in violation of this prohibition.

Finally, the preamble to Protocol I additional to the Geneva Conventions, adopted by consensus on 7 June 1977, put an end to all argument on the matter by a pointing out that:

> *... The provisions of the Geneva Conventions of 12 August 1949 and of this protocol must be fully applied in all circumstances to*

all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

The principle of the equality of belligerents before the law of war, which is in a way the corollary of the autonomy of *jus in bello with* regard to *jus ad bellum,* is thus firmly rooted in both treaty law and state practice.

This principle dominates the entire body of the laws and customs of war. It finds its main application, however, in the status of prisoners of war as it took shape in Europe from the Seventeenth Century. The decision to make war was the responsibility of the sovereign alone; the soldier who was in the sovereign s service could not be held responsible for his participation in the hostilities. Hence, captivity in a war situation was no longer seen as a dishonor or a punishment but as a security measure whereby the captor prevented enemy against him. When peace was restored, prisoners of war had to be freed, regardless of their number or rank and without any ransom being demanded. This was the rule laid down by Article LXIII of the Treaty of Munster of 30 January 1648, which put an end to the Thirty Years War. All Prisoners of War shall be released on both sides, without payment of any ransom, without distinction and without exception...

If the application of the principle of the equality of belligerents before the law of war raises major difficulties in situations of international armed conflict, it may well be imagined that even more formidable obstacles lie in its way in situations of non-international armed conflict. Indeed, a state facing an insurrection will almost invariably begin by invoking a dual inequality: On the one hand, the state will

accuse the insurgents of having violated national law and endeavour to bring the full force of the criminal law to bear against them; while claiming to be fully within its rights, it will do everything it can to criminalize its adversaries; On the other hand, the state will rely on the inequality of the insurgents legal status under domestic law and, in most cases, under international law, to justify rejecting any relationship with them based on an equal footing.

This clearly indicates the case where by the autonomy of *jus in bello* with regard to *jus ad bellum* and the principle of the equality of belligerents before the law of war meet with particular obstacles in situations of non-international armed conflict.

Review Questions

☻ What is the rule on the use of force at the time International Humanitarian Law was first developed? What about today? Can you list the cases where use of force becomes legal?

☻ What it the reaction of IHL to the ones resorting to force unlawfully?

☻ What does *jus ad bellum* and *jus in bello* are separated mean? And what is their implication to the application of the rules of IHL? Is it a plausible argument that there is autonomy of *jus in bello* with regard to *jus ad bellum* ? How?

☻ Explain the principle of equality of belligerents before the law.

1.4 Scope of application of international humanitarian law

The fundamental rule establishing the scope of application of international humanitarian law states that it is applicable in

international armed conflicts. When there is an armed conflict, the international law of peace existing between the states concerned will largely be superseded by the rules of international humanitarian law. The international law of peace, however, will continue to be of great importance, particularly for the relationship between the parties to a conflict and neutral states.

If the application of international humanitarian law is dependent up on the existence of armed conflict, it becomes, therefore, essential to see what this phrase actually refers to. Traditional international law was based upon a rigid distinction between the state of peace and the state of war. Countries were judged as either in a state of peace or a state of war and there were no intermediate states, although there were cases in which it was difficult to tell whether the transition to a state of war has been made. So long as two countries were at peace, the law of peace the normal rules of international law ---govern relations between them and if once they enter the state of war, the law of peace ceases to apply and their relations with one another become subject to the law of war, while their relations with other states not party to the dispute will be governed by the law of neutrality.

No such clear picture can be discovered today as since 1945, countries have rarely regarded themselves as being in a formal state of war. In response to this changing scenario, international humanitarian law now becomes applicable as soon as there is an international armed conflict without being subject to how the states party to the conflict define their status. There is also no sharp dichotomy between peace and armed conflict in international law such as used to exist between peace and war. A state of war usually presumed a complete a rupture of normal relation between the parties

though today armed conflict between two countries does not necessarily mean that all non- hostile relations between them cease unlike what had been assumed widely in the past. Today neither an armed conflict nor a formal state of war has such an effect. Thus, diplomatic relations between the parties will not necessarily be terminated or suspended because there is armed conflict between them.

Coming back to our main concern, it is now well established that the application of international humanitarian law is not dependent upon the existence of a formal state of war, or indeed upon the existence of what has sometimes been called war in the factual sense. The Geneva Conventions that provide the applicability of the rules of international humanitarian law as governed by Common Art. 2 Para. I, provide that the conventions apply to all cases of declared war or another armed conflict which may arise between two or more of High Contacting parties even if the state of war is not recognized by one of them. Although the final phrase does not deal expressly with the situation in which neither party to an armed conflict admits that it is in a state of war, it is generally believed that the Conventions were intended to apply in such a case, so that the last phrase should be read as if it said even if the state of war is not recognized by one or both of them. That is certainly the way in which it was interpreted in practice in most conflicts since 1949 as neither side has admitted that it was in a state of war, yet they have treated the Geneva Conventions as applicable. The Conventions are also applicable in a case where a sate declares war but does not engage in actual hostilities as was the case with some Latin American states during World War II.

The Hague Conventions of 1907 and a number of other earlier treaties on humanitarian law are stated to apply only in time of war. In

practice, however, the rules which they contain are treated as applicable in an international armed conflict, whether or not that conflict is regarded by the parties as a war or not.

The Geneva Conventions do not define armed conflict and this omission was said to be apparently deliberate, since it was hoped that this term would continue to be purely factual and not become laden with legal technicalities. The ICRC Commentary on the Geneva Conventions takes a very broad view of what constitutes an armed conflict. It provides that any difference arising between two states and leading to the intervention of the members of the armed forces is an armed conflict even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. It will generally be stated therefore that when fighting reaches a level of intensity which exceeds that of isolated clashes it will be treated as an armed conflict to which the rules of international humanitarian law apply. And that in any event, only the use of force by the organs of a state, rather than by private persons, will constitute an armed conflict.

Generally speaking, the application of international humanitarian law is not dependent on a formal declaration of war that nowadays occur only occasionally. It has already been noted that international humanitarian law now becomes applicable in any international armed conflict, whether or not a state of war exists between the parties. It follows that a declaration of war is not necessary for the application of humanitarian law. In fact, there are cases in which declaration of war have been delivered by one state to another through diplomatic channels as was done in World War I and II. But in most cases the parties to a conflict had denied that they were in a state of war. There have, however, been cases in which states have expressed the view,

by means other than a formal declaration, that they regarded themselves as being at war. Thus, in both 1948 and 1967 a number of Arab states made explicit stamens to the effect that they were at war with Israel, and similar statements were made by Iran and Iraq during the 1980-88 Iran-Iraq War, as well as by Pakistan during its 1965 conflict with India.

It has also been established that it is irrelevant to the validity of international humanitarianly law whether the States and Governments involved in the conflict recognize each other as States. Because the applicability of the rules of international humanitarian law is not dependent upon whether the parties to a conflict recognize one another as states or not. Throughout the Arab-Israel conflict, for example, the Arab sates have not recognized Israel as a state; yet, both sides in that conflict have accepted the application of international humanitarian law. The question of whether the parties to an armed conflict are sates is said to be objective and not a matter to be determined by the subjective recognition policies of each party hence it is not important to determine the parties as states for the rules of international humanitarian law to apply

In addition, the application of humanitarian law in international armed conflicts does not depend on whether an armed conflict has been started in violation of a provision of international law, e.g. the prohibition against aggressive war. The victims of military aggression contrary to international law are also bound by the rules of international humanitarian law. Hence, the governing rule of international humanitarian law in this respect provides that it shall apply equally to all the parties to an armed conflict, irrespective of which state was responsible for starting the conflict and of whether

that State was guilty of an act of aggression based on the rules of public international law.

Looking at the issue from a different perspective, there are cases in which the UN may resort to use force in its peace-keeping operations and other military operations. The issue that comes into picture in this case is whether this international humanitarian law shall be observed in peace keeping operations and other military operations of the United Nations or whether it is an exception. Although there was originally some doubt about the applicability of international humanitarian law to UN forces, it is now generally accepted that such forces are subject to humanitarian law, whether they were established as peace-keeping forces or for the purpose of engaging in enforcement action. Thus, the Institute *de droit international* has confirmed that the humanitarian rules of the law of armed conflict apply to the United Nations as of rights and they must be complied with in every circumstance by United Nations forces which are engaged in hostilities. A second Institute resolution maintains that this obligation also extends to those rules of the law of armed conflict which are not of a specifically humanitarian character. Given that this is the case when the UN establishes a force of its own, it is clear that the rules of humanitarian law are applicable to a force under national control which operates with the authority of the Security Council.

There are cases in which the armed conflict remains non-international when there is no other state involved in the conflict. An armed conflict is said to be non-international if it is a confrontation between the existing governmental authority and groups of persons subordinate to this authority and is carried out by force of arms within national territory and reaches the magnitude of an armed riot or a civil war.

Now, the question is whether the scope of application of international humanitarian law also encompasses this kind of conflict.

In non-international armed conflict, each party shall be bound to apply, as a minimum, the fundamental humanitarian provisions of international law embodied in the four 1949 Geneva Conventions, the 1954 Cultural Property Convention, and the 1977 Additional Protocol II. German soldiers, for example, like their Allies, are required to comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts. However, such conflicts are characterized, i.e. irrespective of whether that conflict is characterized as internal or international.

This rule setting for the application of international humanitarian law to non-international armed conflicts was only embodied in treaty form for the first time in the 1949 Geneva Conventions. Today, there are two instruments which expressly apply to non-international armed conflicts. Common Art. 3 of the Geneva Conventions contains a series of rudimentary provisions dealing with minimum rights and duties, such as the requirements that those *hors de combat* be treated humanely and that the wounded and sick be collected and cared for, and the prohibition against murder, torture, hostage taking, humiliating and degrading treatment, and the passing of sentences and carrying out of executions without a fair trial. AP II is a far more detailed code for application in internal armed conflicts.

ICRC has provided a definition of humanitarian law in a more comprehensive manner enabling the reader to understand the scope of application of the law. It defines it as those international rules established by treaty of custom which are specifically intended to solve humanitarian problems directly arising from international or

non-international armed conflicts and which, for humanitarian reasons, limit the right of the parties to a conflict to use methods and means of warfare of their choice or protect persons and property that are, or may be, affected by the conflict.

This definition, no doubt, requires some explanation. Therefore, we have to discuss it in brief. The aim of international humanitarian law is to protect the human being and to safeguard the dignity of man in the extreme situation of war. The provisions of international humanitarian law have always been tailored to fit human requirements. They are bound to the aspiration of the protection of man from the consequences of brute force. The duty to respect the individual takes on special significance when the perpetrator of the violence is the State. Clearly, therefore, international humanitarian law is a part of that branch of international law safeguarding human rights from abuse by State power.

As is the case with every rule of law, the provisions of international humanitarian law are the result of a compromise, i.e. the weighing of conflicting interests. International humanitarian law must make allowance for the phenomenon of war and legitimate military goals. We call this the criterion of military necessity. On the other hand, the individual who does not or no longer participate in the hostilities must be protected as best as possible. The conflicting interests of military necessity and humanitarian considerations can be death within rules which limit the use of force in war but do not prohibit it when such use is legitimate. In this case, only international humanitarian law can do the best possible and can even set forth absolute prohibitions in the cases of, for example, torture which is forbidden in all circumstances, without exception.

We can, therefore, infer that humanitarian law will only be endorsed by those responsible for using military force if it takes into account military considerations. In the real world, therefore, humanity must always take into consideration requirements of military necessity. In this, the law does not sanction the use of brute force; it reflects a desire to set realistic limits to the use of force which can be successfully applied. It is not the purpose of international humanitarian law to prohibit war or to adopt rules rendering war impossible. Rather, international humanitarian law must reckon with war, the better to keep the effects thereof within the boundaries of absolute military necessity.

Review Questions

☻ How do you define armed conflict?

☻ What is the relationship between IHL and armed conflict? Would there be any place for IHL to be applied where there isn't any declared war? Do you have a legal authority supporting your idea?

☻ What would happen to the application of IHL if the armed conflict is a non-international one? Cite appropriate provisions for your answer.

☻ What is the definition of IHL provided by the ICRC? Provide a brief explanation.

1.5 Sources of Contemporary International Humanitarian Law

The first and the main source of international humanitarian law is to be found in treaties. History tells that rules of International humanitarian Law, particularly rules on the treatment and exchange of prisoners and wounded, have since long been laid down in bilateral treaties. The systematic codification and progressive development of

this branch in general multilateral treaty also started in the midst of the 19th century, which is relatively early as compared with other branches of international law.

A salient feature of the treaties of international humanitarian law is that most often a new set of treaties are supplemented or replaced with more details earlier ones after major wars taking into account new technological or military developments. Treaties of international humanitarian law have therefore been accused of being □one war behind reality□. This is however true for all law and it is only rarely has it been possible to regulate or even to outlaw a new means or method of warfare before it has been applied.

Today, international humanitarian law is not only one of the most codified branches of international law but its relatively few instruments are also rather well coordinated with each other.

Of all the treaties signed so far, the four Geneva Conventions of 12 August 1949 for the protection of the victims of war are making up the main sources of international humanitarian law. The first of these conventions is Convention for the Ameliorations of the Conditions of the Wounded and sick in Armed Forces in the Field. The second Geneva Convention is Convention for the Amelioration(to make better) of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; and the third one is Convention relative to the Treatment of Prisoners of War; and fourthly there is Convention relative to the Protection of Civilian Person in Time of War.

These four Geneva Conventions have also been supplemented with the two Additional Protocols of 8 June 1977. One of which, Protocol I, is Protocol Additional to the Geneva Conventions of 12 August 1949, and

relating to the Protection of Victims of International Armed Conflicts; and Protocol II is Protocol Additional to Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts.

These treaties have the great advantage of putting their rules relatively beyond doubt and controversy, "in black and white", ready to be applied by a soldier without needing first to make a doctoral research on practice. They, furthermore, legitimize their rules for the majority of "new states" which are able to influence them in the elaboration process and which can more easily agree to be bound by them in their frequently voluntarist approach.

The disadvantages of these treaties, as of all treaty law, are that they are technically unable to have a general effect-automatically to bind all states. Fortunately, most of the treaties of international humanitarian law are considered today among the most universally accepted treaties and only few states are not bound.

It has also been provided that however important the treaty rules of international humanitarian law may be even if they constitute obligations *erga omnes*, belong to *jus cogens* and if their respect is not subject to reciprocity- as treaty law they are only binding on states part to those treaties and, as far as international armed conflicts are concerned, only in their relation with other states parties to those treaties. The general law of treaties governs the conclusion, entry into force, reservations, application, interpretation, amendment, modification of international humanitarian law treaties and even their denunciation, which however, only takes effect after the end of an armed conflict in which the denunciating state is involved. The main exception to the general rules of the law of treaties for international

humanitarian law treaty is provided by that same law of treaties; Once an international humanitarian law has become binding for a state, even a substantial breach of its provisions by another state, including by its enemy in an international armed conflict, does not permit the termination or suspension of the operation of that treaty as a consequence of that breach.

Although international humanitarian law is a branch widely codified in widely accepted multilateral conventions, customary rules remain important to protect victims on issues not covered by treaties, when non-parties to a treaty are involved in a conflict, where reservations have been made against the treaty rules and also because of the fact that international criminal tribunals prefer to apply customary rules, and because in some legal systems only customary rules are directly applicable in domestic law. Given the time consuming nature and other difficulties of treaty-making in an international society with more than 190 members and the rapidly evolving needs of war victims for protection against new technological and other inhumane phenomena, the importance of custom, redefined or not, may even increase in this field in the future. This, therefore, indicates the fact that customary law comes to be another source of international humanitarian law.

This, however, doesn't mean that there aren't any difficulties in defining a certain practice in terms of whether it is a customary rule or not. Those who follow a traditional theory of customary law and consider it to stem from the actual behavior of states in conformity with an alleged norm face particular difficulties in the field of international humanitarian law. First, for most rules this approach would limit practice to that of belligerents. And this comprises a few subjects whose practice is difficult to qualify as 'general' and even

more as accepted as law. Second, the actual practice of belligerents is difficult to identify, particularly as it often consists of omissions. There are also additional difficulties, e.g., war propaganda manipulates truth and secrecy makes it impossible to know which objectives were targeted and whether their destruction was deliberate. Finally, states are responsible for the behavior of individual soldiers even if the latter did not act in conformity with their instructions, but this does not imply that such behavior is also state practice constitutive of customary law. It is, therefore, particularly difficult to determine which acts of soldiers count as state practice.

Other factors must, therefore, also be considered when assessing whether or not a rule belongs to customary law: whether qualified as practice *lato sensu* or as evidence for *opinio iuris*, statements of belligerents, including accusations against the enemy of violations of international humanitarian law and justifications for their own behavior.

To identify general practice, statements of third states on the behavior of belligerents and on a claimed norm in diplomatic fora have to be similarly considered. Military manuals are even more important, because they contain instructions by states restraining their soldiers actions, which are somehow statements against interest. Too few States, generally Western States, have, however, sophisticated manuals available to the public to consider their contents as evidence for general practice in the contemporary international community.

It is also logically argued and even said to be totally uncontroversial that most, but clearly not all, rules of the two 1977 Additional Protocols today provide a formula for parallel rules of customary

international law. Taking an overall view of all practice it can, for instance be found that a rule of the two 1977 Additional Protocols corresponds today to customary law binding on all states and belligerents, because it codified previously existing general international law, or because it translated a previously existing practice into a rule, because it combined, interpreted, or specified existing principles or rules, or because it concluded the development of a rule of customary international law or finally because it was a catalyst for the creation of a rule or of customary international law through subsequent practice and multiple consent of states to be bound by the treaty.

Custom, however, has also very serious disadvantages as a source of international law. It is very difficult to base uniform application of the law, military instruction and the repression of breaches on custom which by definition is in constant evolution, is difficult to formulate, and is always subject to controversy. The codification of international humanitarian law began 150 years ago precisely because the international community found the actual practice of belligerents unacceptable, while custom is, despite all modern theories, also based on the actual practice of belligerents.

Review Questions

☻ It has been said that Treaties of IHL are “one war behind reality”, what do you understand by this expression?

☻ What are the main treaty sources of IHL? Can you explain what each of them are about?

☻ What is additional in Additional Protocols? Do they have any special

advantage in terms of clarity? Do they have any drawbacks?

☻ Why do we need customary rules of IHL where there are so many treaties?

☻ Explain the issues and complexities in assessing whether a rule belongs to customary law or not.

1.6 Fundamental Principles of International Humanitarian Law

Philosophers such as Grotius, took an interest in the regulation of conflicts well before the first Geneva Convention of 1864 was adopted and developed. In the 18th century, Jean-Jacques Rousseasu made a major contribution by formulating the basic principle about the development of war between states as:

War is in no way a relationship of man with man but a relationship between states, in which individuals are enemies only by accident; not as men, nor even as citizens, but as soldiers (...). Since the object of war is to destroy the enemy state, it is legitimate to kill the latter's defenders as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legitimate to take their lives.

In 1899, Fyodor Martens laid down the following principle for cases not covered by humanitarian law: (...) civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity,

and from the dictates of public conscience. This, also known as the Martens clause, was already considered a standard part of a customary law when it was incorporated in Article1, Paragraph 2, of Additional Protocol I of 1977.

While Rousseau and Martens established principles of humanity, the authors of the St. Petersburg Declaration formulated, both explicitly and implicitly, the principles of distinction, military necessity and prevention of unnecessary suffering, as follows:

> Considering: *(...) That the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men;*
>
> *That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.*

The Additional Protocols of 1977 reaffirmed and elaborated on these principles, in particular that of distinction: (...) the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. (Art. 48, Protocol I; see also Art. 1, Protocol II).

There are also established underlying principles of proportionality that seek to strike a balance between two diverging interests, one dictated by considerations of military need and the other by requirements of humanity when the rights or prohibitions are not absolute. Different writers follow different approach in describing these principles, and for the sake of making a brief explanation of the

subject matter we have preferred the one that divides them into seven principles tin reviewing the rules in the past and present.

The first rule is that persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction. The second fundamental rule provides that it is forbidden to kill or injure an enemy who surrenders or who is *hors de combat* .The third one is the wounded and seek shall be collected and cared for by the party to the conflict which has them in his power. Protection also covers medical personnel, establishments, transport and material. The emblem of the Red Cross (Red Crescent, Red lion and sun) is a sign of such protection and must be respected.

The fourth rule reads: Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief. And fifthly is provided that everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.

The sixth one states that parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering. The seventh and the last fundamental rule provides that Parties to a conflict shall at all times distinguish between the civilian population

and combatants in order to spare the civilian population and property. Neither the civilian population nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

Review Questions

☻ Explain the principle concerning the development of war as stated by Jean-Jacques Rousseasu.

☻ Can you state what Fyodor Martens clause, or commonly referred to as ‘Martens Clause’ says? What it the significance of this principle?

☻ What are the principles formulated in St. Petersburg Declaration?

☻ Discuss the principle of proportionality seeking to balance the interest dictated by considerations of military need and by the requirements of humanity.

1.7 International Humanitarian Law and International Human Rights Law

International Humanitarian Law and International Human Rights Law are so intertwined that it is quite essential to give a brief overview of their commonalities and differences so that one can distinguish the salient feature of each. What therefore becomes of much interest to us in this discussion is the question about how they differ since there are many things they share in common.

One of the major and important goals of the United Nations is the promotion of human rights and their observance by Member States. The Universal Declaration of Human Rights of 10 December 1948, the

two International Covenants of 16 December 1966, one on Civil and Political rights, the other on Economic, Social and Cultural rights, and other treaties on specific aspects of human rights protection are the results to date of a major effort to strengthen the position of the individual in the face of State power.

Regional human rights agreements complete the picture of the efforts of affording safeguard to these fundamental rights. Human rights agreements and the relevant rules of customary law are also the ones intended to safeguard a series of individual rights from State abuse. The very important nature common to all those safeguards is that they are valid in all circumstances, at all times. Only in emergency situations and in strictly defined circumstances, known as situations of public emergency, do the different agreements allow for derogations from some of their provisions.

The treaties of humanitarian law, on the other hand, protect particularly vulnerable categories of persons from abuse of state power. Unlike human rights agreements which contain general rules applicable at all times, the protective rules and mechanisms of international humanitarian law are applicable only in time of war. That means, the application of international humanitarian law presupposes the occurrence of armed conflict and this makes its application to be limited to this exceptional circumstance. In this sense, it can be stated that international humanitarian law is that part of human rights law which is applicable in armed conflicts. In contrast, however, to the human rights or also referred to as named peacetime agreements, there can be no derogation under any circumstances from any of its provisions and will apply in almost all circumstances.

A further specificity of international humanitarian law is the fact that its provisions govern relations with the enemy. Members of the enemy armed inhabitants of a territory occupied by an enemy power are, for example, protected under the Fourth Geneva Convention, etc. Human rights agreements, however, affect above all the relationships between the authorities and citizens of the same State.

Owing to the fact that they are applied in different circumstances, international humanitarian law has not taken all the basic rights and freedoms guaranteed under human rights agreements and turned them into protective conditions in time of war. The protection of persons deprived of their liberty from torture and other inhuman treatment, for example, can be found in both branches of the law, for it constitutes an absolute right in the true sense of the words. International Humanitarian law does not, however, make provisions for the protection of the freedom of expression or movement, for example, since those freedoms have an entirely different meaning in a bellicose context. On the other hand, the treaties of humanitarian law contain sections which are foreign to human rights texts, such as the rules on the use of weapons.

Another possible difference is that international humanitarian law contains many more rules requiring the individual or the community to act than classic human rights law. This can be seen clearly in the 1864 Geneva Convention, Article 6, Paragraph 1 of which reads as follows: Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for. The law of Geneva presently in force contains a wealth of such directions for action although it cannot be said that the victim has a corresponding right to claim in court in the event of non-action.

International humanitarian law is often mentioned in the same breath as refugee law, the provisions of which apply whenever a person flees his homeland seeking protection in another country out of justified fear of persecution. Refugees exist in peacetime and in time of war. The Geneva Conventions contain some provisions which govern the specific situation of refugees in time of war but do not weaken the protection provided under refugee agreements. Moreover, refugees are entitled to the same protection under humanitarian law as other civilians affected by the consequences of hostilities.

Review Questions

☻ Is there any relationship between International Human Rights Law and IHL? Explain

☻ What is the difference between International Human Rights Law and IHL in terms of their scope of application?

☻ What is the difference between International Human Rights Law and IHL concerning the relationship they address?

CHAPTER TWO : Combatants and Civilisas

2.1 Who is a Combatant?

It is self-evident and has been accepted, and is still true today beginning from the earliest times, that members of a State□s armed forces are allowed to take part in war. Article 1 of the 1907 Hague Regulations relating to war on land even goes a step further stating that the laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling certain clearly set conditions. These include: they be commanded by a person responsible for his subordinates; they need to have a fixed distinctive emblem recognizable at a distance; they have to carry arms openly; and finally, they have to conduct their operations in accordance with the laws and customs of war.

Considering the most recent international humanitarian law documents and more specifically Additional Protocol I, the definition of combatant is provided as all members of the armed force with the

exception of the medical and religious personnel. This definition invites another discussion as to what armed forces comprise. The broad legal definition of armed forces provide that these consist of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates.

This definition of armed forces has also been incorporated into the formulations that the armed forces of a party to a conflict consist of all its organized armed forces, groups, and units as well as militias and voluntary corps integrated in the armed forces. This formulation also provides two mandatory features that have to be there in any armed force. These include the need to be under a command responsible to that party for the conduct of its subordinates, and secondly that they have to be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in an armed conflict.

It has, therefore, generally been established that only members of the armed forces, as defined above, with the exception of the medical and religious personnel who are specially protected by Geneva Convention III, are combatants. What is in the very nature of acquiring such a status as combatants is that they have the right to participate directly in hostilities. Thus, membership of the armed forces is an indispensable prerequisite to combatant status; and armed forces in the meaning of international law, however, have the legal status of an organ of a party to the conflict. If persons participating directly in hostilities lack either of these two prerequisite elements of combatant status, participating directly in hostilities lack either of these two prerequisite elements of combatant status, then they cannot have combatant status and hence if they fall into the hands of the enemy, they cannot acquire the secondary status of prisoner of war.

It has also been said that it is the natural and legally logical consequence of this broad definition of armed forces that combatant is defined as a member of the armed forces who is entitled to participate directly in hostilities. The fundamental structure of the term combatant in international law which was established prior to Additional Protocol I, however, has not been changed: it describes a person who is a member of the armed forces, being an organ of a party to a conflict which is a subject of international law. The party to the conflict determines the type and size of its armed forces in accordance with its national laws. On the level of international law, members of these armed forces are entitled to take part directly in hostilities. With regard to direct participation in hostilities, combatants are privileged solely by that entitlement, the lack of which makes them criminals liable to prosecution.

This status and the right to enjoy certain privileges, however, is not without any duty to be observed by the combatants. There is provided a basic rule that essentially imposes the duty on the combatants to distinguish themselves from civilians as discussed in the following parts of this material. This basic rule providing that combatants must distinguish themselves from the civilian population is supplemented by another provision in Additional Protocol I, which is formulated as an unambiguous exception. It is provided by recognizing that there are situations in occupied territories and in wars of national liberation where, owning to the nature of the hostilities, a combatant, especially a guerilla, cannot so distinguish himself from the civilian population. And hence the rule provides that he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly during each military engagement and during such time as he is

visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

If combatants within the scope of the exceptional rule do not meet the minimal requirements of the rule, then they forfeit their secondary status as prisoners of war in the event of capture by the enemy. Nevertheless they shall be afforded protection equivalent to that of Geneva Convention III and Additional Protocol I, which includes protection in the case of criminal prosecution. Hence, those combatants who have forfeited their prisoner of war status due to their failure to discharge their duties as prescribed by international humanitarian law are, thus, prosecuted and punished under the national criminal law of the detaining power with, of course, treatment equivalent to that of Arts. 99-108 Geneva Convention III shall be ensured.

If a combatant, for example, who is a member of the regular armed forces and is captured while participating directly in hostilities is not wearing an appropriate uniform, or an organized resistance movement does not wear a permanent distinctive sign visible from a distance, then generally a breach of the duty of distinction and additionally as well as a change of perfidy as per Additional Protocol I is applicable.

The other issue that is worth mentioning in this part is the case relating to the inhabitants of a territory which has not yet been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to form themselves into armed units. They are also known as *levee en masse*. Such spontaneous resistance must, therefore, meet four requirements

in order for the persons taking part to obtain the primary status of combatants.

The first requirement is that spontaneous armed resistance is permitted by international law only in territory which is not occupied. And a territory is considered to be "not occupied" if it is not or not yet under the factual control of the enemy. It follows, therefore, that resistance movements which are organized autonomously by the population of an already occupied territory do not fall into the category of *levee en masse*.

The second requirement provides that the population of this unoccupied territory must take up arms "spontaneously" on the approach of the enemy. This requires two conditions to be met: first, only a resistance initiated by the population itself, not one directed or organized in advance by organs of the state, fulfils this condition. Secondly, armed resistance is only permitted against "invading troops" and therefore not in territory which is already occupied. These two conditions are obviously not met by originated resistance movements and hence persons taking part in such a movement will not have the status of combatants unless they formally make up or joined the armed force.

The third requirement relates to the principle of authorization. In a number of instances, the civilians involved in armed resistance may not have had the time to organize themselves as required by the Hague Regulation. In this case, the principle of authorization states that only a state or another party to the conflict recognized as a subject of international law has the authority to decide on the use of armed force within the framework of international law. In every developed legal order, self-help is the exception. International law, as

a legal order, in principle also prohibits private individuals from deciding on the use of armed force, even if their motivation in a concrete case can be recognized as stemming from patriotism or other ethical reasons. In this matter the rule is provided in Art.2 HagueReg unambiguously. It provides that persons wanting to resist an attack must secure the authorization of their state by joining the armed forces, a militia, or a volunteer corps. Only if it is, in fact, impossible to joint these armed units, and provided that the conditions provided to become *levee en masse* are met are civilians exceptionally permitted to take up arms by their own decision.

The fourth and final requirement is the participants in such a *levee en masse* must respect the laws and customs of war and are thus bound by the basic duty which applies to all combatants.

If spontaneous resistance fighters fulfill these four conditions, then they have the primary status of combatants. In the event of capture by the adverse party to the conflict, they are granted the secondary status of prisoners of war. It should be noted, however, that in modern day armed conflicts, the *levee en masse* has become less significant because, as a rule, the regular armed forces of an attacking party are armed to a degree that simply cannot be countered with the weapons available to spontaneous resistance. But, whatever the effectiveness in countering the resistance may be, a very important issue is that people taking part in these spontaneous reaction become combatants provided that they fulfill the above provided requirements.

The other issue relating to the duty of all combatants is the obligation to comply with an international law applicable in armed conflicts. In addition to the important duty to distinguish themselves from the

civilian population, combatants are also bound by the duty to abide by the applicable international law. Though all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant. In other words, in principle the breach of rules of international law applicable in armed conflicts does not result in the offenders forfeiting their primary status as combatants, and hence if they fall in to the hands of the adverse party to the conflict, they do not forfeit their secondary status of prisoners of war but they will be called to account under the applicable legal regulations of the detaining power.

To sum up, combatants who fall into the hands of the adversary shall be prisoners of war as per the provisions of the HagueReg and Additional Protocol I. They shall not be called to account for their participation in lawful military operations. But, if they have committed violations of international law, they will be prosecuted under the laws of the detaining power and international law.

☻ How do you define a combatant? What about the armed forces?

☻ What possible benefits or privileges are there in acquiring the status of combatant?

☻ Are there any duties that are imposed on combatants? Are there any exceptions to these duties? Indicate the effects of failure to comply with those duties.

☻ What do you understand by the phrase *levee en masse?* Can you state the requirements to be met by such a resistance? What is the effect of failure to comply with those requirements?

2.2 Who is a Civilian?

A glance at the history of war shows that it is the civilian population that suffers most from the consequences of hostilities. This seems to have been especially true since the beginning of the 20th century. And yet, the law of war is based on the very simple idea that hostilities should take place exclusively between the armed forces of the conflicting parties. War must, therefore, be keep out of the way of civilians.

The greatest achievement of the 1949 Diplomatic Conference concerns the fourth convention relativing to the protection for civilian persons in time of war. The convention, which is also supplemented by Additional protocol I, states that persons who fall into the hands of the enemy are protected under international law.

Military operations against civilians are not and never have been a permissible method of winning the war. The civilian population must not be involved in fighting, but instead has to be respected in all circumstances. This requirement results from the law of humanity and from the dictates of public conscience, as the Martens clause so appropriately states.

In the reality of modern warfare, however, the civilian populations exposed to numerous dangers. For the purpose of international humanitarian law, two types of hazard, each calling for different protective provisions, must be distinguished. The first one is the dangers caused by military operation themselves; and second, the threats to which vulnerable persons are exposed when in the power of the enemy.

Civilians, as has been defined herein below, are all those who are not members of the armed forces. As such, they are entitled to the

protection of international humanitarian law in so long as they may not take part in hostilities. Any civilians who do so must reckon with the loss of protection and the use of force against them. Yet, they retain their status as civilians and, in particular, they do not become combatants. Usually, a national law severally penalizes acts of violence by irregulars, and in some cases, the mere possession of a weapon may be a punishable offence.

The fourth convention indicated above also prohibits the use of civilians as a shield to protect certain areas of installations, usually of military importance, from enemy attack. The collective punishment of civilians and measures aimed at intimidating or terrorizing the civilian population, pillage, hostage-taking and reprisals against civilians are also forbidden.

To protect the civilian population as a whole, or groups of specially vulnerable people such as the wounded and sick, the infirm and elderly, children, etc safety zones may be set up with the consent of both sides, during the conflict, e.g. in the form of an open city or in time of peace already demilitarized zones. Such zones may not be subjected to military attack; on the other hand, they may not be defended against an enemy advance. Their sole purpose is to guarantee the physical survival of the population sheltering within them.

In addition, the parties to the conflict are urged to take special care of children under fifteen years old who have been orphaned or separated from their families. Searches for missing relatives should also be facilitated.

The legal status and the protection of civilians in the power of the enemy are comprehensively well regulated in the Fourth Convention. Additional protocol I, therefore, has only to fill certain loopholes or to amend a few unsatisfactory regulations. It is thus made clear, for example, that refugees and stateless persons in the territory of a party to the conflict must be treated as protected persons in the same way as nationals of the power of origin. Special efforts must be made to reunite families.

The Protocol also deals with the situation of journalists engaged in a dangerous professional mission. Article 70 makes it clear that journalists performing a "dangerous mission", i.e. working in a theatre of war, are to be considered as civilians in every respect. They are, therefore, entitled to the protection normally due to civilians; however, they cannot claim any special rights. They must comply with the restrictions pertaining to civilians, and in particular must not take part in hostilities. If they expose themselves to unusual dangers, then they must accept the consequences.

In addition to these generally applicable provisions, the Fourth Convention contains special rules of certain typical situations in which civilians need protection from the enemy such as aliens on the territory of a party to the conflict, persons living in an occupied territory etc. to make the discussion of this matter brief (and we recommending the reader to read further on the above issues,) let us see the core idea of this particular topic, i.e. who civilians are, based on the rules of the international humanitarian law.

The rules on international humanitarian law define civilians either in the negative saying they are persons who are not members of the armed forces, or in a manner that is circular which calls for another

definition saying the civilian population comprises all persons who are civilians. Since the concept has to be made clear from the outset, it becomes essential to see the rule in a much more detail from different perspectives.

Article 50 of Additional Protocol I defines civilians as persons who are not members of the armed force. It is also contained in numerous military manuals defined in a like manner and is also reflected in a reported practice. This practice includes that of all the states which are even not, at that time, party to Additional Protocol I. The International Criminal Tribunal for the Former Yugoslavia in its judgment in the Blaskic case in 2000 also defined civilians as persons who are not, or no longer, members of the armed forces.

Some state practice, on the other hand, tends to add the condition that civilians are persons who do not participate in hostilities. But this additional requirement merely reinforces the rule that a civilian who participates directly in hostilities loses protection against attack. However, such a civilian does not thereby become a combatant entitled to a prisoner-of-war status and, upon capture, may be tried under a national law for his mere participation in the conflict, subject to fair trial guarantees.

This rule, however, is not without exception. An exception to it is the *levee en masse* entertaining the case whereby the inhabitants of a country which has not yet been occupied, on the approach of the enemy, spontaneously taking up arms to resist the invading troops without having time to form themselves into an armed force. Such persons are considered combatants if they carry arms openly and respect the laws and customs of war. This is a long-standing rule of customary international humanitarian law already recognized in the

Lieber Code and the Brussels Declaration. It is codified in The Hague Regulations and the Third Geneva Convention. Although of limited current application, the *levee en masse* is still repeated in many military manuals, including very recent ones.

One may at this point pose a question as to whether this definition of civilians in the international armed conflicts also applies to the non-international armed conflicts without any need to define it again. The definition that "any person who is not a member of armed forces is considered to be a civilian" and that "the civilian population comprises all persons who are civilians" was included in the draft of Additional Protocol II.

The first part of this definition was amended to read "a civilian is anyone who is not a member of the armed forces or of an organized armed group" and both parts were adopted by consensus in Committee III of the Diplomatic Conference leading to the adoption of the Additional Protocols. However, this definition was dropped at the last moment of the conference as part of a package aimed at the adoption of a simplified text. As a result, Additional Protocol II does not contain a definition of civilians or the civilian population even though these terms are used in several provisions.

It can, therefore, be argued that the terms "dissident armed forces or other organized armed groups... under responsible command" in Article 1 of Additional Protocol II inferentially recognize the essential conditions of armed forces, as they apply in international armed conflict, and it follows that civilians are all persons who are not members of such forces or groups. Subsequent treaties applicable to

non-international armed conflicts have similarly used the terms civilians and civilian population without defining them.

While state armed forces are not considered civilians, practice is not clear as to whether members of armed opposition groups are civilians subject to the rule on loss of protection from attack in case of direct participation, or whether members of such groups are liable to attack as such, independently of the operation of this rule. Although the military manual of Colombia defines the terms civilians as "those who do not participate directly in military hostilities either internal or international conflict", most manuals define civilians negatively with respect to combatants and armed forces, and are silent on the status of members of armed opposition groups.

The rule of international humanitarian law on the protection of civilians provides that they are protected against attack unless and for such time as they take a direct part in hostilities. This gives a kind of warning to the civilians saying that they lose their protection against attack when and for such time as they take a direct part in hostilities. So, if a civilian decides to take part in hostilities, he does it in the pain of loosing all the protections that he enjoys from his status as a civilian. This rule is contained in Article 51 (3) of Additional Protocol I, and no reservations have been made to it as it was adopted.

Likewise, numerous military manuals state that civilians are not protected against attack when they take a direct part in hostilities. This rule is supported by official statements and reported practice. This practice includes that of State not, or not at the time, party to Additional Protocol I also. When the ICRC appealed to the parties to the conflict in the Middle East in October 1973, even before the adoption of Additional Protocol I to respect civilian immunity from attack, unless and for such time as they took a direct part in

hostilities, the states concerned (Egypt, Iraq, Israel and Syria) replied favorably.

Like wise in non-international armed conflicts it has generally been laid down that civilians are immune from a direct attack unless and for such time as they take a direct part in hostilities. In addition, this rule is set forth in other instruments pertaining to non-international armed conflicts. Many military manuals which are applicable in or have been applied in non-international armed conflicts have also included the same rule.

In the case concerning the events at La Tablada in Argentina, the Inter-American Commission on Human Rights held that civilians who directly take part in fighting, whether singly or as members of a group, thereby become legitimate military targets but only for such time as they actively participate in combat.

Since the definition of civilian revolves around and also depends on participation in the act of hostility, it becomes essential to investigate what constitutes participation in a manner leading to loss of the protection that the civilian enjoys. It is clear that the lawfulness of an attack on a civilian by an enemy depends on what exactly constitutes direct participation in hostilities and related thereto when direct participation begins and when it ends. Unfortunately, the meaning of direct participation in hostilities has not yet been clarified. What is left for us is to see certain cases as expressly provided not constituting participation as such and through this it is possible to detect certain cases in which the civilian remains immune both from attack and prosecution.

Civilians whose activities are merely intended to support the adverse party's war or military efforts or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.

The distinction between direct and indirect participation had previously been developed by the special Representative of the UN Commission on Human Rights for El Salvador. It is clear, however, that international law does not prohibit states from adopting legislation that makes it a punishable offence for anyone to participate in hostilities, whether directly or indirectly.

The report on the practice of Rwanda makes a distinction between acts that constitute direct participation in international and non-international armed conflicts and excludes logistical support in non-international armed conflicts from acts that constitute direct participation. According to the responses of Rwanda army officers to a questionnaire referred to in the report, unarmed civilians who follow their armed forces during an international armed conflict in order to provide them with food, transport munitions or carry message, for example, lose their status as civilians. In the context of a non-international armed conflict, however, unarmed civilians who collaborate with one of the parties to the conflict always remain civilian. According to the report, this distinction is justified by the fact that in internal armed conflicts civilians are forced to cooperate with the party that holds them in its power.

It is fair to conclude, however, that outside the few uncontested examples cited above, in particular, the use of weapons or other means to commit acts of violence against human or material of the enemy forces, a clear and uniform definition of direct participation in hostilities has not been developed in state practice.

Several military manuals specify that civilians working in military objectives, for example, munitions factories, do not participate directly in hostilities but must assume the risks involved in an attack on that military objective. The injuries or death caused to such civilians are considered incidental to an attack upon a legitimate target which must be minimized by taking all feasible precautions in the choice of means and methods, for example, by attacking at night . The theory that such persons must be considered quasi combatants, liable to attack, finds no support in modern state practice.

The issue of how to classify a person in case of doubt is another complex and difficult matter. In the case of international armed conflicts, Additional Protocol I has sought to resolve this issue by stating that in case of doubt as to whether a person is a civilian or not, that person shall be considered to be a civilian. Some States have written this rule in to their military manuals though there others who have expressed reservations about the military ramifications of a strict interpretation of such a rule. In particular, upon ratification of Additional Protocol I, France and the United Kingdom expressed their understanding that this presumption does not override commanders duty to protect the safety of troops under their command or to preserve their military situation, in conformity with other provisions of Additional Protocol I.

Concerning this The US Naval Handbook states that:

> *Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time.*

In the light of this expression, it is therefore fair to conclude that when there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious.

In the case of non-international armed conflicts, the issue of doubt has hardly been addressed in State practice, even though a clear rule on this subject would be desirable as it would enhance the protection of the civilian population against attack. In this respect, the same balanced approach as described above with respect to international armed conflicts also seems justified in non-international armed conflicts .

Review Questions

☻ Explain the significance of Martens Clause in relation to the protection of civilians.

☻ Can you mention the conducts of warfare that are forbidden due to the danger they entail to the civilian population?

☻ What is the significance of GC IV and AP I in relation to the protection of civilians? Discuss each and indicate also the relationship they have.

☻ Discuss the various definitions given for civilians.
☻ Is there any change in the definition of civilians depending on whether the armed conflict is international or non international one?
☻ What does 'participation in the of hostility' mean? What is its effect on the protection provided for civilians?
☻ Explain direct and indirect participation by citing an appropriate case.
What happens to the classification in case of doubt?

2.3 The Basis for Distinction

The governing rule of international humanitarian law provides that the parties to the conflict must at all times distinguish between civilians and combatants, Attacks may only be directed against combatants and attacks must not be directed against civilians.

The principle of distinction between civilians and combatants was first set forth in the St. Petersburg Declaration, which states that the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy. The Hague Regulations do not as such specify that a distinction must be made between civilians and combatants, but the prohibition of the attack or bombardment, by whatever means, of town, villages, dwellings, or buildings which are undefended is based on this principle. This principle of distinction is now codified in Additional Protocol I to which no reservations have been made.

The prohibition on directing attack against civilians is also laid down in protocol II, Amended protocol II and protocol III to the convention on Certain Conventional Weapons and in the Ottawa Convention

banning anti-personnel landmines. The Ottawa Convention banning anti-personnel landmines especially expressly states that the Convention is based, *inter alia*, on the principle that a distinction must be made between civilians and combatants. In addition, under the Statute of the International Criminal Court, intentionally directing attacks against the civilian population as such or against individual civilians not taking direct parts in hostilities constitutes a war crime in international armed conflicts.

Numerous military manuals, including those of States not, or not at the time, party to Additional protocol I, stipulate that a distinction must be made between civilians and combatants and that it is prohibited to direct attacks against civilians. Sweden's international humanitarian law manual identifies the principle of distinction as laid down in Additional Protocol I as a rule of customary international law. In addition, there are numerous example of national legislation including the legislation of states not, or not at the time, party to additional protocol I. which make it a criminal offence to direct attacks against civilians.

In their pleadings before the International court of Justice in the Nuclear Weapons case, many States invoked the principle of distinction. And in its advisory opinion in the same case, the Court stated that the principle of distinction was one of the cardinal Principles of international humanitarian law and one of the intransgressible principles of international customary law.

In another case, when the ICRC appealed to the parties to the conflict in the Middle East in October 1973 even before the adoption of Additional protocol I to respect the distinction between combatants

and civilians, the States concerned such as Egypt, Iraq, Israel and Syria replied favorably.

Military manuals which are applicable in or have been applied in non-international armed conflicts also specify that a distinction must be made between combatants and civilians to the effect that only the former may be targeted. To direct attacks against civilians in any armed conflict is an offence under the legislation of numerous states. There are also a number of official statements pertaining to non-international armed conflicts invoking the principle of distinction and condemning attacks directed against civilians.

As early as 1938, the Assembly of the League of Nations stated that "the international bombing of civilian population is illegal". The 20th International Conference of the Red Cross in 1965 solemnly declared that governments and other authorities responsible for action in all armed conflicts should conform to the prohibition on launching attacks against a civilian population.

Subsequently, a UN General Assembly resolution on respect for human rights in armed conflicts, adopted in 1968, declared the principle of distinction to be applicable in all armed conflicts. The plan of Action for the years 2000-2003, adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999, requires that all parties to an armed conflict respect "the total ban on directing attacks against the civilian population as such or against civilians not taking a direct part in hostilities". In a resolution adopted in 2000 on protections of civilians in armed conflicts, the UN Security Council reaffirmed its strong condemnation of the deliberate targeting of civilians in all situations of armed conflicts.

The jurisprudence of the International Court of Justice in the Nuclear Weapons case, of the International Criminal Tribunal for the Former Yugoslavia, in particular in the *Tadic case, Martic case and Kupreskic case,* and of the Inter-American Commission on Human Rights in the case relative to the events at La Tablada in Argentina provides further evidence that the obligation to make a destination between civilians and combatants is customary in both international and non-international.

Generally, Additional Protocol I sets the rule that the armed forces of a party to the conflict consist of all organized armed of forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.

Likewise, many military manuals specify that the armed forces of a party to the conflict consist of all organized armed groups which are under a command responsible to the party for the conduct of its subordinates. This definition is supported by official statements and reported practice of states which are even not, or not at the time, party to additional protocol I.

In essence, this definition of armed forces covers all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command. As a result, a combatant is any person who, under responsible command, engages in hostile acts in an armed conflict on behalf of a party to the conflict.

This definition of armed forces builds upon earlier definitions contained in the Hague Regulation and the Third Geneva Convention which sought to determine who are combatants entitled to prisoner-of-war status. The Hague Regulations provides that the laws, rights

and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling four conditions. The first one is, that they have to be commanded by a person responsible for his subordinates; and second, they have to have a fixed distinctive emblem recognizable at a distance, thirdly, they have to carry arms openly; and finally, they have to conduct their operations in accordance with the laws and customs of war.

It further specifies that in countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination □army□. The Hague Regulations and the Third Geneva Convention thus consider all members of armed forces to be combatants and require militia and volunteer corps, including organized resistance movements, to comply with four conditions in order for them to be considered combatants entitled to prisoner- of □war status.

On the other hand, civilians, as it has been attempted to show in the foregoing parts of this material, are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. The definition of civilians as persons who are not members of the armed forces is set forth in Additional Protocol I, to which no reservations have been made is also contained in numerous military manuals. State practice establishes this rule as a norm of customary international law applicable in international armed conflicts as well as non-international armed conflicts.

In its judgment in the Blaskic case in 2000, the International Criminal Tribunal for the Former Yugoslavia defined civilians as □persons who are not or no longer, members of the armed forces□. Some practice adds the condition that civilians are persons who do not participate in

hostilities. This additional requirement merely reinforces the rule that a civilian who participates directly in hostilities loses protection against attack. However, such a civilian does not thereby become a combatant entitled to prisoner-or-war status and, upon capture, may be tried under national law for the mere participation in the conflict, subject to fair trial guarantees. This is, of course, without prejudice to the exception provided for *levee en masse,* as discussed herein above.

Review Questions

☻Concerning the distinction to be made between civilians and combatants, what does the St. Petersburg Declaration state? What about the Hague Regulations? Can you explain what the Ottawa Convention provides?

☻ What do military manuals of different countries, both members and non-members, provide with regard to the same issue?

☻ Discuss the major international resolutions on the distinction to be made between civilians and combatants.

☻ What is the basis for the distinction between civilians and combatants?

2.4 Duty of combatants to distinguish themselves from the civilian population

The rules on international humanitarian law provide that combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack in the pain of losing their right to prisoner-of-war status**.** This rule, as established by state practice, has become a norm of

customary international law applicable in international armed conflicts. It is also a long-standing rule of customary international law already recognized in the Brussels Declaration, the Oxford Manual and The Hague Regulations that combatants have to distinguish themselves from the civilian population which was, of course, subsequently codified in the Third Geneva Convention and Additional Protocol I.

Numerous military manuals specify that combatants must distinguish themselves from the civilian population. This includes even the manuals of states not, or not at the time, party to Additional Protocol I as supported by a number of official statements and other practices.

The Hague Regulations and the Third Geneva Convention state that members of regular armed forces are entitled to prisoner-of-war status, whereas members of militias and volunteer corps are required to comply with four conditions in order to benefit from such status. Additional protocol I impose the obligation to distinguish oneself from the civilian population on all members of armed forces, whether regular of irregular.

Although it is not specifically stated in The Hague Regulations or the Third Geneva Convention, it is clear that regular armed forces have to distinguish themselves from the civilian population during a military operation. Additional Protocol I recognizes the generally accepted practice of states with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a party to the conflict although the protocol, like the Hague Regulations and the Third Geneva Convention, does not explicitly make this a condition for prisoner-of-war status.

Several military manuals remark that the obligation to distinguish oneself does not pose a problem for the regular armed forces because it is "customary" or "usual" for members of the regular armed forces to wear a uniform as a distinctive sign. If members of regular armed forces do not wear a uniform, they risk being charged as spies or saboteurs.

In the *Swarka case* in 1974, an Israeli Military Court found that members of the Egyptian armed forces who had infiltrated in to Israeli territory and launched an attack in civilian attire were not entitled to prisoner-of-war status and could be prosecuted as saboteurs. The Court considered that it would have been illogical to regard the duty to distinguish oneself as applicable to irregular armed forces but not to regular armed forces, as the defendants had claimed.

State practice indicates that, in order to distinguish themselves from the civilian population, combatants are expected to wear a uniform or a distinctive sign and must carry arms openly. Germany's Military Manual, for example, states that:

> *In accordance with the generally agreed practice of states, members of regular armed forces shall wear their uniform. Combatants who are not members of uniformed armed forces nevertheless wear a permanent distinctive sign visible from a distance and carry their arms openly.*

The US Air Force Pamphlet states that a uniform ensures that combatants are clearly distinguishable but that "less than a complete uniform will suffice provided it serves to distinguish clearly combatants from civilians". In the *Kassem Case* in 1969, the Israeli Military Court at Ramallah held that the defendants sufficiently fulfilled the requirement of distinguishing themselves by wearing

mottled caps and green clothes, as this was not the usual attire of the inhabitants of the area in which they were captured.

With respect to carrying arms openly, the US Air Force Pamphlet states that this requirement is not fulfilled by carrying arms concealed about the person or if the individuals hide their weapons on the approach of the enemy. In the *Kassem Case*, the court held that the condition of carrying arms openly was neither fulfilled in a case where the person carried the arms openly in places where they could not be seen nor by the mere fact of bearing the arms during a hostile engagement. The fact that the defendants used their weapons during the encounter with the Israeli army was not determinative, since no weapons were known to be in their possession until they started firing at Israeli soldiers.

Having said this much about the rule prescribing the duties of the combatants to distinguish themselves from the civilians, there is also another case that needs explanation on the same matter relating to the participants in a *levee en masse*. This envisages the case whereby the inhabitants of a country which has not yet been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having time to form themselves into an armed force. These kinds of participants are also considered combatants entitled to prisoner-of-war status provided that they carry arms openly and respect international humanitarian law. This is a long-standing rule of customary international law already recognized in the Lieber Code, the Brussels Declaration, and The Hague Regulations. It is also set forth in the Third Geneva Convention.

While this exception may be considered of limited current application, it is still repeated in many military manuals, including very recent ones, and it, therefore, continues to be regarded as a valid possibility.

There is also another case related to resistance and liberation movements that needs to be differently treated from the above. According to Additional Protocol I, in situations of armed conflict where owing to the nature of the hostilities an armed combatant cannot... distinguish himself from the civilian population while he is engaged in an attack or in a military operation preparatory to an attack. This combatant shall also retain his status as a combatant, provided that he carries his arms openly during each military engagement and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

This rule was subject to much debate at the Diplomatic Conference leading to the adoption of the Additional Protocols, and Article 44 was, as a result, accepted by 73 votes in favor, one against and 21 abstentions. The abstaining states generally expressed concern that this provision might have a negative impact on the civilian population. The United Kingdom, for example, stated that any failure to distinguish between combatants and civilians could only put the latter at risk. That risk might well become unacceptable unless a satisfactory interpretation could be given to certain provisions. All but two of the abstaining states have in the meantime ratified Additional Protocol I without any reservation in this respect

In line with the need to arrive at a satisfactory interpretation, many states have tried to clarify the meaning of this exception and to clearly set out its limits. These limits are threefold. First, many states have

indicated that the exception is limited to situations where armed resistance movements are organized, namely in occupied territories or in wars of national liberation. Secondly, many states have indicated that the term ‘deployment’ refers to any movement towards a place from which an attack is to be launched. Thirdly, Australia, Belgium and New Zeeland have further indicated that the term ‘visible’ includes being visible with the aid of technical means and not just visible to the naked eye.

Egypt, supported by the United Arab Emirates, however, stated at the Diplomatic Conference leading to the adoption of the Additional Protocols that the terms military deployment meant ‘the last step when the combatants were taking their firing positions just before the commencement of hostilities; a guerrilla should carry his arms openly only when within range of the natural vision of his adversary’. The United States, which voted in favor of Article 44 of Additional Protocol I at the Diplomatic Conference, explained that the exception was clearly designed:

> *To ensure that combatants, while engaged in military operations preparatory to an attack, could not use their failure to distinguish themselves from civilians as an element of surprise in the attack. Combatants using their appearance as civilians in such circumstances in order to aid in the attack would forfeit their status as combatants*.

In the meantime, the United States has changed its position and voiced its opposition to this rule. Israel voted against Article 44 of Additional Protocol I because Paragraph 3 ‘could be interpreted as allowing the combatant not to distinguish himself from the civilian population, which would expose the latter to serious risks and was

contrary to the spirit and to a fundamental principle of humanitarian law.

As stated in Additional Protocol I, combatants who fail to distinguish themselves and are not, as a result, entitled to prisoner-of-war status and do not benefit from more favorable treatment in accordance with the Fourth Geneva Convention. But this doesn't mean that their treatment will be arbitrary. They are, as a minimum, entitled to the fundamental guarantees set out in Chapter 32 of the Convention, including the right to a fair trail.

Review Questions

☻ Why is it important that combatants distinguish themselves from civilians? What distinguishing features must be used by them to comply with this rule? What is the effect of non-compliance with the rule?

☻ Discuss the content of the German Military manual and the US Air Force Pamphlet.

☻How does the rule requiring combatants to distinguish themselves from civilians apply with regard to people in *levee en masse.*

☻ Can there be a situation in which a certain combatant cannot distinguish himself? What would be the fate of such a combatant concerning his status as a combatant? What was the concern of high contracting parties in the deliberations made to the adoption of such a principle?

2.5 The Concept of Distinction in Modern Conflicts

International law regarding persons taking part in or affected by an international armed conflict makes a fundamental distinction between combatants and civilians. They indicate the primary status when there is an actual change in circumstances. If a combatant, for example, falls into the power of the enemy he becomes a prisoner of war. The primary status determines the protection afforded to the person by international law. If one is categorized as a civilian, the law affords the general protection of civilians against dangers arising from military operations. In addition, the individual s primary status determines the legal consequences of his or her conduct, for example, the consequences of a violation of international law by a combatant, or of the direct participation in hostilities by a civilian.

How can combatants be distinguished in practice? Especially these days, the distinction between combatants and civilians faces challenges relating to terrorism, the so called irregulars, guerilla fighters etc. And together with the issue of the duty of combatants to distinguish themselves, we can see some points on what international humanitarian law says.

Traditional law requires that members of armed forces have a distinctive emblem recognizable at a distance and should carry arms openly. In practice, those in the armed forces differ from the civilian population in that they wear a uniform. This rule is still in force, as explicitly stated in Protocol I. However, the uniform is not a compulsory and essential attribute of combatants. Protocol I merely requires members of the armed forces to distinguish themselves from civilians in order to promote the protection of the civilian population from the effects of hostilities. In response to the demands of Third World countries, the Diplomatic Conference of 1974-1977 redrafted

the text relating to the obligation for armed forces to distinguish themselves from their environment.

As per this new regulation, the basic rule remains the obligation of combatants to distinguish themselves from the civilian population. Members of the armed forces are rrelieved from this obligation only in situations "where, owing to the nature of hostilities an armed combatant cannot so distinguish himself". From the discussion in the Diplomatic conference, it may be assumed beyond doubt that the exceptional situations in question are only those of belligerent occupation and wars of national liberation. In such circumstances, combatants are permitted to "go under group" and hide among civilians, and are described as guerilla fighters. Nevertheless, even in this type of situation, they must carry arms openly immediately before, during deployment preceding an attack, and during each military engagement. In other words, they must make themselves recognizable as combatants.

This new text which to some extent legitimizes guerrilla warfare was severely criticized. It was feared, for instance, that relaxation of the obligation for combatants to be distinguished at all times from the civilian population would encourage acts of terrorism. This fear is based, at least partly, on some misunderstanding, since the new rule applies only to members of the armed forces of a state involved in an international armed conflict or, in strictly circumscribed conditions, of a recognized national liberation movement. Groups or gangs of terrorists or individual terrorist are not covered by this provision, as they do not belong to any official armed forces. In any case, weapons may be hidden only in a few situations and for a limited period. And finally, this is the strongest argument and the new definition relating to the rights and obligations of combatants in exceptional situations

has not and never will relieve them from the obligation to observe the law of war which forbids terrorist activities in all circumstances and without exception.

Members of the armed forces retain their legal status as combatants even if they violate their obligations and are liable to be prosecuted as war criminals. If captured, they are prisoners of war and come under the protection of the Third Geneva Convention, even if they have been convicted. Irregulars, on the other hand, who fail to observe even the minimal requirement to carry arms openly before and during an attack lose their privileged status, even if they belong to armed forces, and may be prosecuted under penal law by the detaining power merely for taking part in hostilities, they have forfeited their privileged combatant status. It goes without saying, however, that they are still entitled to a regularly conducted trial and to humane treatment within the meaning of the Geneva Conventions.

Review Questions

☻What does the new regulation in relation to the obligation of armed forces to distinguish themselves provide?

☻ What makes it different from the pre-existing rules?

CHAPTER THREE: Protection of Prisoners of War

3.1 Who is Prisoner of War?

As a rule, prisoners of war are members of the armed forces or combatants of one of the parties to the conflict who fall into the hands of the adverse party during an international armed conflict. Even during captivity, prisoners of war retain their legal status as members of the armed forces, as indicated externally by the fact that they are allowed to wear their uniforms, that they continue to be subordinate to their own officers who are themselves prisoners war, and that at the end of hostilities they have to be returned to their own country without delay.

A number of other categories of persons are listed in the Third Convention as having the same status as members of the armed forces. Let□s begin with members of a resistance movement belonging

to a party to the conflict. They have to satisfy the following four requirements if their members are to be treated as prisoners of war: they must be commanded by a person responsible for his subordinates, they must have a fixed distinctive sign which is recognizable at a distance if they have no uniform of their own, they must carry arms openly and they must respect the laws and customs of war.

Certain persons authorized to accompany the armed forces without belonging to them are also to be treated as prisoners of war e.g. civilian members of ship and aircraft crews, war correspondents, though not those journalists who are to be treated as civilians under the rules of protocol I.

Lastly, members of the population who spontaneously take up arms to resist approaching enemy forces, *levee en masse*, are entitled to be treated as prisoners of war. Members of medical services who are taken prisoner are granted special status; they must be given the care of prisoners of war of their own side, or be returned to the party to which they belong. In general, any doubt as to the status of a captured person must be cleared up by a competent tribunal.

Prisoners of war keep their legal status from the time they are captured until they are repatriated. They cannot lose this status during their captivity, either by any measure of the authority in charge or by their own action. Protected persons may in no circumstances renounce the rights to which they are entitled under the Geneva Convention.

The Hague Regulations and the Third Geneva Convention state that members of regular armed forces are entitled to prisoner-of-war status, whereas members of militias and volunteer corps are required

to comply with four conditions in order to benefit from such status. Additional protocol I impose the obligation to distinguish oneself from the civilian population on all members of armed forces, whether regular or irregular.

Although it is not specifically stated in The Hague Regulations or the Third Geneva Convention, it is clear that regular armed forces have to distinguish themselves from the civilian population during a military operation. Additional Protocol I recognizes the generally accepted practice of states with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a party to the conflict, although the protocol, like the Hague Regulations and the Third Geneva Convention, does not explicitly make this a condition for prisoner-of-war status.

Participants in a *levee en masse*, as mentioned above, namely the inhabitants of a country which has not yet been occupied who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having time to form themselves into an armed force, are considered combatants entitled to prisoner-of-war status if they carry arms openly and respect international humanitarian law. This is a long-standing rule of customary international law already recognized in the Lieber Code, the Brussels Declaration, and The Hague Regulations as well as in the Third Geneva Convention.

Though it is combatants who are eligible to acquire the secondary status of becoming prisoner of war, this right is not always there for combatants in whatever condition they may be. In other words, there are cases in which a person, even if he is a combatant, may be denied the right to be a prisoner-of-war. Additional Protocol I states that if combatants fail to distinguish themselves from the civilian population

while they are engaged in an attack or in a military operation preparatory to an attack, they do not have the right to prisoner-of-war status and do not benefit from more favorable treatment in accordance with the Fourth Geneva Convention.

The rule that combatants engaged in espionage have no right to prisoner-of-war status and may be tried is a long-standing rule of customary international law already recognized in the Lieber Code, the Brussels Declaration, and The Hague Regulationsas well as in Additional Protocol I. This envisages another case whereby a combatant may loose his right of becoming a prisoner-of-war.

Numerous military manuals specify that combatants engaged in espionage have no right to prisoner-of-war status and that they may be regarded as spies. It is also a long-standing practice already recognized in the Lieber Code, the Brussels Declaration, and the Hague Regulations that espionage is defined as gathering or attempting to gather information in territory controlled by an adverse party through an act undertaken on false pretences or deliberately in a clandestine manner. The definition includes combatants who wear civilian□s attire or who wear the uniform of the adversary but excludes combatants who are gathering information while wearing their own uniform. This definition is now codified in Additional Protocol I and is also set forth in numerous military manuals.

In addition, this rule applies only to a spy captured in the act whilst in enemy controlled territory. The Brussels Declaration and the Hague Regulations recognize that a spy who rejoins his or her armed forces and who is subsequently captured must be treated as a prisoner-of-war and incurs no responsibility for previous acts of espionage. This

rule is also set forth in Additional Protocol I and is recognized in a number of military manuals.

Combatants engaged in espionage and as a result lose their right to the status of prisoner-of-war, however, shouldn't be subject to arbitrary treatment and they have the right to fair trial. Hence, a spy taken in the act may not be punished without a previous trial. This requirement was already recognized in the Brussels Declaration and the Hague Regulations. As it is also set forth in a number of military manuals generally, captured spies are entitled to the fundamental guarantees set out in Chapter 32, including the right to a fair trial.

This is emphasized in the military manuals of Canada, Germany, New Zealand and Nigeria. It is also laid down in Additional Protocol I, which states that, anyone who is not entitled to prisoner-of-war status, and does not benefit from more favorable treatment in accordance with the Fourth Geneva Convention, still enjoys the fundamental guarantee of Article 75 contained in Additional Protocol I. Consequently, the summary execution of spies is prohibited.

The other groups that do not have the right to the prisoners of war status are mercenaries. As defined in Additional Protocol I, they do not have the right to combatant or prisoner-of-war status. This rule is also contained in a few other treaties and numerous military manuals which specify that mercenaries are not entitled to combatant or prisoner-of-war status.

A manual used for instruction in the Israeli army states that this rule is part of a customary international law. The participation of a mercenary in an armed conflict is punishable under the legislation of a number of states. This rule is also supported by official statements

and reported practice. This practice includes that of states not, or not at the time, Party to Additional Protocol I though the United States fail to recognize this rule as customary.

What the word mercenary refers to is another most important issue that needs to be discussed in this part. Additional Protocol I defines a mercenary as a person who:

I) Is specially recruited locally or abroad in order to fight in an armed conflict;

II) Does, in fact, take a direct part in the hostilities;

III) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

III) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict?

IV) Is not a member of the armed forces of a party to the conflict; and

V) Has not been sent by a state which is not a party to the conflict on an official duty as a member of its armed forces.

This definition in additional protocol I is very restrictive because it requires that all six conditions be cumulatively fulfilled in order that a certain person be called a mercenary. In addition, the definition requires evidence that a person accused of being a mercenary is motivated to take part in the hostilities essentially by the desire for private gain and is promised material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces. Among those military manuals

collected for this study that contain a definition of a mercenary, nine follow the definition in Additional Protocol I while four others simply refer to the desire for private gain. The legislation of 11 states of the former Soviet Union defines mercenaries with respect to their desire for private gain without further qualification.

But whatever the practice and the definition coined by individual states may be, in light of the foregoing, discussion it can be concluded that the customary rule that mercenaries do not have the right to combatant or prisoner-of-war status applies only to those persons fulfilling the conditions set forth in the definition of a mercenary in Article 47 of Additional Protocol I.

Lastly, it should be recalled that members of the armed forces of a party to the conflict who are not nationals of that party and who do not fulfill all six conditions of the definition of a mercenary in Article 47 of Additional Protocol I are entitled to prisoner-of-war status. It is important to note in this respect that nationality is not a condition for prisoner-or-war status according to a long-standing practice and Article 4 of the Third Geneva Convention.

A person accused of being a mercenary and thereby denied the prisoner of war status, however, is not to be treated arbitrarily. As a rule, he under any circumstances, may not be punished without a previous trial. The military manuals of Canada, Germany, Kenya and New Zealand, for example, emphasized that mercenaries are entitled to a fair trial. This is consistent with the fundamental guarantees set out in Chapter 32, including the right to a fair trial. This is also laid down in Additional Protocol I, which states that anyone who is not entitled to prisoner-of-war status, and does not benefit from a more favorable treatment in accordance with the Fourth Geneva

Convention, still enjoys the fundamental guarantees provided for in Article 75 of Additional Protocol I. Consequently, the summary execution of mercenaries is prohibited.

According to this rule, states are free to grant a prisoner-of-war status to a mercenary or withhold it, but the mercenary has no right to claim such a status as a defense against prosecution. As the UN Secretary-General reported in 1988, Iran claimed to have captured nationals from other countries whom it alleged were mercenaries, but it asserted that, rather than punish them, it chose to treat them like other prisoners of war. Similarly, the US Air Force Commander□s Handbook asserts that the United States has regarded mercenaries as combatants entitled to prisoner-of □war status upon capture. This shows that a state is free to grant such status. The handbook also states, however, that □the US government has always vigorously protested against any attempt by other nations to punish American citizens as mercenaries□. This statement does not undermine the current rule to the extent that these protests were made with respect to persons who did not fulfill the stringent conditions of the definition of mercenaries contained in Article 47 of The Additional Protocol I, which was adopted by consensus.

Review Questions

☻ What is the advantage, if any, of prisoners of war status?

☻ Is there any situation whereby members of resistance movement may be granted the status of prisoners of war?

☻ What are the conditions under which a prisoner of war may lose his status? Since he has already lost his status, it is hard to think of any protection to him and hence is subject to any kind of treatment. Does this statement make sense? Why?

☻ How do you define mercenaries? Do they have the right of prisoners of war status?

☻ “For mercenaries, prisoner of war status is not a right to be claimed, but it is up to the states concerned to grant such a title.” Explain!

3.2 Protection and Treatment of Prisoners of War

The third Geneva Convention relative to the treatment of prisoners of war deals extensively with the plight of those taken captive in war. It contains a fundamental provision for the treatment of prisoners of war and that is “Prisoners of war shall at all times be treated humanely”. This is a principle provision to be applicable to all prisoners of war and has to be applicable in all the times when a state retains those prisoners of war. It is, moreover, explicitly stated that prisoners of war are not in the hands of individuals or military units, but are in the care of the adverse state, since it is the state, as a party to the Geneva Conventions, that is responsible for fulfilling its international obligation. And most importantly, being a prisoner of war should, in no way be taken to be a form of punishment.

Prisoners of war keep their legal status from the time they are captured until they are repatriated. They cannot lose this status during their captivity, either by any measure of the authority in charge or by their own action. Protected persons may in no circumstances renounce the rights to which they are entitled under the Geneva Convention. This protection from their won, possibly unthinking conduct, which may have major consequences in wartime, is extremely important.

The Third Convention also called the "POW convention" regulates to the smallest detail the treatment of prisoners of war in a very extensive manner. A comprehensive overview may be obtained by studying the convention and the specialized literature and in this part we will make a brief comment mainly focusing on the most fundamental ones recommending the reader to go through the provisions from 21 to 108 of the Convention.

The first point that we will raise here relates to information that prisoners have to give. When captured, prisoners of war are obliged to give name, military rank, date of birth and serial number only. They can not be compelled, in any circumstances, to provide further information. Also under the third convention, torture and other sever ill-treatment are considered war crimes if the state captured them resorts to a commits those acts with a view to collecting information for whatever reason.

Prisoners are also entitled, immediately upon capture, to complete what is called a capture card, which is then sent, via the ICRC Central Tracing Agency, to the official information bureau in the prisoner" own country. The latter has the task to inform the prisoners" relatives. In this way, links with home and family can be rapidly re-established.

Prisoners of war must be transferred as soon as possible out of the danger zone and brought to a place of safety, in which the living conditions must be "as favorable as those for the forces of the detaining power who are billeted in the same area". Neither ships nor civilian prisons, for example, meet these requirements. And as far as possible, the conditions of captivity should take account of the habits and customs of the prisoners.

Prisoners of war in good health may be required to work, but may be employed in dangerous work only if they volunteer and the convention, by way of example, has explicitly mentioned removal of mines as dangerous work. Although the use of prisoners of war with suitable training to remove mines may appear appropriate particularly if they have personal knowledge of the mines location, it will be done only if the prisoner freely consents to do the job.

Prisoners of war are entitled to correspond with their relatives through letters and cards and this is to be run by the ICRC Central Agency. They may also receive aid in the form of individual parcels.

They are subject to the law of the country of the detaining power, especially the regulation applying to the armed forces. In the event of offences, judicial or disciplinary measures may be taken against them , in accordance with the law. The detaining power may also prosecute POWs for offences committed before capture e.g. War crimes committed in an occupied territory. However, prisoners being so prosecuted are entitled to a properly conducted trial and, even if convicted, retain their legal status as prisoners of war. Nevertheless, they may have their repatriation deferred until they have served their sentences.

Any measures of reprisal against prisoners of war are forbidden without exception. The Third Convention on treatment of the prisoners of war also provides a very important group of provisions for repatriation of prisoners of war and this subject matter is discussed in the following sub-topic of this material.

Generally, the summery of the treatment of prisoners of war, as has been discussed in this part, gives emphasis the protection that has to be provided to all the prisoners of war without exception for all the times they stay as prisoners of war. So as a minimum standard of protection provided by the Convention is that: they have to be protected from any arbitrary treatment by the detaining power, and their stay in the control of the detaining power is to be governed by the convention beginning from the day on which they were detained up to repatriated .

Review Questions

☻ Is there any difference between being a prisoner of war and a prisoner for committing a crime.?

☻ What is the information that a prisoner of war may lawfully be required to give when captured? What is the purpose of completing a capture card?

☻ What is the minimum standard of living condition for the prisoners of war when they are in the hands of a detaining power? Does the convention allow a compulsory labor for prisoners of war?

☻ Briefly what rights and privileges are there for the prisoners of war?

3.3 Duties of Prisoners of War

It has been attempted to show in the foregoing discussion that prisoners of war are members of the armed forces of one of the parties to a conflict who fall into the hands of the adverse party during an international armed conflict. With regard to the treatment of these people, The Third Geneva Convention relative to the

treatment of prisoners of war deals extensively with the plight of those taken captive in war. The whole summery of its content rests on the most important principle of international humanitarian law pertaining to humanity. This principle with regard to the prisoners of war essentially demands that Prisoners of war shall at all times be treated humanely. From this principle, it wouldn t be hard to perceive that the main concern of the convention revolves around how the prisoners are treated rather than around how they behave. This is basically because the these people have fallen in the hands of an enemy power and are taken captive in a manner that gives no choice of acts by them but everything being determined by that enemy power.

Even though this is the case, it is still possible to think of some duties to be observed by prisoners of war. The governing principle relating to the prisoner of war provides that being a prisoner of war is in no way a form of punishment. Without going deep into the matter, it has also been established as a rule that, during captivity, prisoners of war retain their legal status as members of the armed forces and this is indicated externally by the fact that they are allowed to wear their uniforms.

These prisoners, most importantly, continue to be subordinate to their own officers who are themselves prisoners of war, until they returned to their own country at the end of hostilities. It is, moreover, explicitly stated that prisoners of war are not in the hands of individuals or military units, but are in the care of the adverse state, since it is the state, as a party to the Geneva Conventions, that is responsible for fulfilling its international obligation. This being the case and also taking note of the above idea, the prisoners, in all circumstances, are

duty bound to comply with all the orders they are given by their superior who are themselves prisoners of war.

Review Questions

☻ The Third Geneva Convention relative to the treatment of prisoners of war says “Prisoners of war shall at all times be treated humanely” Explain

☻ It has been said that, during captivity, prisoners of war retain their legal status as members of the armed forces. Do you agree? Explain why? What is the implication of this statement in terms of the duties of prisoners of war?

3.4 Repatriation of Prisoners of War

The confinement of prisoners of war is a safety precaution intended only to prevent enemies who have surrendered from taking up arms again against their captors. Since its purpose is neither repression nor punishment, it must end as soon as the reasons for that safety precaution ceases to exist. Prisoners of war must, therefore, be released and repatriated without delay after the cessation of hostilities, and seriously wounded and seriously sick prisoners unable to bear arms again, together with members of the medical service who are not required to look after their fellow prisoners, must be released before the end of hostilities. The belligerents are also free to conclude agreements for the early release of prisoners of war who are elderly or are fathers of large families or who have already endured prolonged captivity.

These principles also apply to civilian prisoners. All interned enemy nationals must be released once the reasons for their internment cease to exist and in any case immediately after the cessation of

hostilities. It follows that prisoners of war and civilian internees, other than those who escape or die in captivity, will normally be released and repatriated during or at the end of hostilities.

When one side suffers a crushing defeat and the whole of its territory is occupied, as was the case when Germany and Japan unconditionally surrendered at the end of the Second World War, the victors can make the arrangement they like to bring home their own nationals and decide unilaterally. In all other cases, repatriation will be a bilateral process carried out jointly by the opposing parties, usually with the help of a third party.

A brief review of the provisions of the Geneva Conventions regulating the release and repatriation of captives leads to the conclusion that two situations must be considered: first, the release, admission to hospital in a neutral country, and repatriation of prisoners during hostilities; and the second one is, the release and repatriation of prisoners at the end of hostilities. Reagarding, the release admission to hospital in a neutral country, and repatriation of prisoners during hostilities

Malraux, the most notable writer in IHL, wrote: The whole duty of the soldier is to do his best to riddle enemy flesh with shreds of iron. Many combatants falling into enemy hands are permanently disabled, and even after they are cured, will be unable to take any further part in hostilities. There is no justification whatsoever for continuing to hold them prisoner. The detaining power is none safer for detaining them and they are a burden on health services already overstrained by the war. For reasons of humanity and in the best interests of the belligerents, these unfortunate persons should be returned to their own countries and their families.

Repatriation of prisoners of war is a very ancient practice attested by innumerable cartels or agreements between hostile powers under the Ancient Regime. The Geneva Convection of 22 August 1864 provides:

> *Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.*
>
> *Commanders-in-Chief may hand over immediately to the enemy outposts enemy combatants wounded during an engagement, when circumstances allow and subject to the agreement of both parties.*
>
> *Those who, after their recovery, are recognized as being unfit for further service shall be repatriated.*
>
> *The others may likewise be sent back, on condition that they shall be considered as being absolutely neutral.*

On the pretext that the belligerents should have an absolute right to retain those wounded enemy servicemen whom they considered important to have in their possession, the 1906 Diplomatic Conference decided to abolish this obligation and replace it by the completely discretionary provision in the Geneva Convention of 6 July 1906. The text of the provision reads: the belligerents shall have authority to agree to send back to their own country the sick and wounded who have recovered, or who are in a condition to be transported and whom they do not desire to retain as prisoners.

The first few months of World War I sufficed to show how absurd this decision was. Before long, the belligerents found themselves having to maintain hundreds, and later on thousands, of mutilated and disabled men whom it was inhumane and pointless to keep in captivity. As there was nothing in the 1906 Convention to provide for the release of

these unfortunates, the warring parties had to conduct laborious negotiations with the help of neutral states in order to conclude bilateral agreements for the exchange of war-disabled prisoners.

Chastened by this experience, the Diplomatic Conference of 1929 adopted Article 68 of the Prisoner-of-war Convention, which reintroduced the earlier rule providing for the compulsory repatriation of seriously ill and seriously wounded prisoners. However, in the Second World War, it became difficult to apply this rule because lines of communication were totally disrupted. The Protecting powers and the ICRC, nevertheless, managed to organize ten operations for the exchange of seriously sick or seriously wounded prisoners of war at the neutral ports of Smyrna, Lisbon, Goteborg and Barcelona or through Switzerland, in which 21,500 British, Italian, German, Canadian, American, French and other war-disabled, as well as several thousand medical personnel were released during hostilities. In addition, Germany unilaterally repatriated several thousands of disabled nationals of countries under German occupation.

The Diplomatic Conference of 1949 consequently did not hesitate to maintain the principle of compulsory repatriation for seriously sick and seriously wounded prisoners of war. It is laid down in the Third Convention as:

> *The parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel…*

To allow for the possibility of occupation and political upheavals caused by the war, the Conference ruled, however, that no prisoners

of war eligible for repatriation under that paragraph might be repatriated against their will during hostilities. And, thus, it provided that to be repatriated direct are the following: first, incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished; secondly, wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished; and finally, wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.

But these general principles are said to be too vague to serve as a reliable guide for practitioners who have to choose patients for repatriation during hostilities. The Diplomatic Conference, therefore, supplemented them with a detailed list of the infirmities and afflictions giving eligibility for early repatriation. As a list of this kind has to be modified at regular intervals to keep developments in weaponry and medical progress, it is given in a model agreement annexed, which is not of course merely for guidance to the Convention, instead of in the Convention itself. Parties to conflict are empowered to make special direct repatriation agreements among themselves. If they do not do so, the Annex constitutes the ordinary law to be followed and applies automatically.

If the detaining power□s medical services were solely responsible for choosing the patients to be repatriated, all these precautions might well be ineffective and differing interpretations leading to interminable argument would hold up repatriations. The Diplomatic Conference of 1949 therefore decided to follow the practice that had proved so valuable in both world wars. It provided for Mixed Medical Commission of three members, two of whom were to be nationals of a neutral country and the third appointed by the detaining power, to be

formed to examine sick and wounded prisoners of war and decide whether they should be repatriated or not, or whether they should be referred for examination at a later date, as appropriate. The detaining power is bound to carry out the decisions of the Mixed Medical Commission with in three months of being notified of them.

As these precautions are intended to ensure, as far as possible, the criteria for repatriation during hostilities on the grounds of disability or sickness are uniformly applied, it was obviously preferable to make a single body responsible for appointing the neutral members of mixed medical Commission. In accordance with the practice followed during the Second World War, the Diplomatic Conference designated the International Committee of Red Cross to make these appointments, and to settle the nominees terms of service by agreement with the detaining power.

Needless to say, prisoners of war repatriated under these regulations may not again be employed on active military service. It is also clear from the model agreement annexed to the Third Geneva Convention that the Diplomatic Conference of 1949, following the practice adopted in both world wars, recognized only injuries leading to serious permanent disability, such as total blindness or loss of a hand or foot, as giving entitlement to direct repatriation during hostilities.

This is understandable, although the Convention strictly forbids repatriated prisoners of war to be employed on active military service, the detaining power will never willingly release prisoners who, although disabled, can still be of use to the enemy war effort, for example, in a workshop or office in place of an able-bodied individual who can then be sent to the front. It was, therefore, necessary to adopt severe rules providing for direct repatriation during hostilities to seriously disabled wounded. But there are always large numbers of

wounded in prisoner-of war camps who, although badly injured, do not qualify for repatriation during hostilities. Can anything be done for them?

This question arose in the First World War. The French government, especially, was unwilling to return disabled soldiers to Germany who could still be useful to the German army, for example, in General Staff offices or depots. At the suggestion of the ICRC, the Swiss Federal Council therefore offered to admit to hospital in Switzerland those wounded who did not quite qualify for repatriation during hostilities, but whose injuries made life in a prison camp almost unbearable for them. It was not unreasonably felt that for these minor seriously wounded, a tragically inadequate term coined at the time internment in a neutral country was less cruel than captivity in an enemy prison camp and more likely to lead to their recovery, whilst making it impossible for them to resume military service.

The Swiss Federal Council negotiated the internment and admission to hospital in Switzerland of more than 67,000 sick and wounded prisons of war, over 25,000 of whom were still in Switzerland when the Armistice was signed on 11 November 1918. Denmark, Norway, Sweden and the Netherlands also agreed to take in wounded and sick prisoners and give them hospital treatment.

The Diplomatic Conference of 1929 did not neglect this possibility of easing the plight of disabled prisoners. Besides direct repatriation during hostilities, the 1929 Convention on prisoners of war provides for the accommodation in a neutral country and hospital treatment for wounded and sick prisoners who do not fully qualify for repatriation.

In spite of all the efforts of the International Committee, and the offers of services by the Swiss-Federal Council, which again said that it was ready to receive wounded and sick prisoners for hospital

treatment in Switzerland, the latter provision was never applied in the Second World War. Partly for financial reasons, the belligerents agreed to extend direct repatriation to wounded and sick prisoners eligible for admission to hospital in a neutral country.

The Diplomatic Conference of 1949, nevertheless, retained this possibility to make life easier for wounded and sick prisoners. This is in the Third Convention which stipulates that the parties to a conflict shall endeavor, with the co-operation of the neutral powers concerned, to make arrangements for the accommodation in neutral countries of wounded and sick prisoners of war whose recovery may be expected within one year of the date of the wound or the beginning of the illness, and of prisoners whose mental or physical health is seriously threatened by continued captivity.

As a general rule, able-bodied prisoners are not repatriated before the end of hostilities, but in a long-drawn-out conflict, the harmful effects of several years of captivity with no prospect of early release cannot be ignored. Alarmed by the growing number of prisoners of war sinking in to a state of depression and by the ravages of a form of neurasthenia sometimes known as the barbed-wire syndrome, the International Committee, therefore, proposed in its appeal of 26 April 1917 that as many prisoners as possible should be repatriated, beginning with those longest in captivity.

This appeal and the negotiations conducted by the ICRC and the Swiss Federal Council led to the insertion in the Franco-German agreements of 15 March and 26 April 1918 of provisions for the repatriation, irrespective of number and rank, soldiers aged 48 or over who had been in captivity for at least eighteen months, and of men aged over 40 who had three or more children and had been in captivity for at least eighteen months. Officers fulfilling these conditions were to be interned in Switzerland. Regrettably, the

ICRC s efforts to bring about a similar agreement in the Second World War were unsuccessful.

The Diplomatic Conference of 1949, nevertheless, endorsed the possibility that the parties to the conflict might, if they so wished, conclude agreements for the direct repatriation or internment in a neutral country of able-bodied prisoners of war who had undergone a long period of captivity.

On the other hand, the Geneva Convention of 22 August 1864 laid down the principle that army medical personnel were exempt from capture. Under enemy occupation, they were to allow continuing their work of attending to the wounded in their care, and were to be delivered to the outposts of their own army when their patients no longer needed them. It was indeed generally accepted that only if they were completely exempt from capture could medical personnel stay with the wounded during an enemy advance, and continue their errand of mercy unhindered.

In both World Wars, however, the belligerents agreed that some captured medical personnel could be retained to tend to prisoners of war of their own nationality. In some cases, bilateral agreements fixed the number of doctors and nurses to be retained in proportion to the total number of prisoners.

The 1949 Geneva Conventions made similar provisions saying that: doctors, nursing staff and military chaplains could be retained by the adverse party only in so far as the state of health, the spiritual needs and the number of prisoners of war require. All such personnel whose retention is not essential under Article 28 of the First Convention shall be returned to the party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit.

In practice, medical personnel and chaplains who are not required to look after their companions in captivity are usually repatriated together with seriously sick and seriously wounded prisoners of war, as in both World Wars. The Geneva Conventions have, thus, meticulously defined the categories of prisoners of war whom the belligerents can or must repatriate direct during hostilities, or who may be admitted to hospital or interned in a neutral country. The same applies to medical personnel and chaplains. The principles that determine the situation of prisoners of war are in fact crystal clear, and the 1949 Diplomatic Conference was also able to base the rules concerning them on a long and well-established practice.

Concerning enemy civilians, until the end of the nineteenth century, it was generally accepted that nationals of one of the parties to the conflict who were on the territory of the adverse party when hostilities began, should be allowed to leave. They were given a stated time, often several weeks or months, to dispose of their property and pack their bags. This practice was apparently so well-established that the 1907 Hague Conference refused to insert in the Hague Regulations a rule restricting-but by so doing implicitly legitimizing recourse to the internment of enemy civilians.

These, which are also called illusions, vanished in August 1914. Immediately after the outbreak of war, the belligerents began to intern thousands of enemy nationals- not only men of military age, but also women, children, the elderly and the infirm. Narrating the situation, it has been said that:

> *From the first days of the war onwards enemy civilians were ruthlessly hunted down while trying to flee enemy territory in droves. Needless to say, it was those who were the slowest off*

the mark, precisely because they were the least capable of doing harm, who were arrested without knowing why, having had neither time nor leave to take their property away with them. Most of them were penniless. At the drop of a hat they were treated as criminals, and taken to concentration camps or hastily improvised centers whose equipment was rudimentary or, worse, often grossly inadequate. Here men, women and children, the sick and the infirm, people of all sorts and conditions, were herded together, all too often in lamentable overcrowding and discomfort undiminished by the passage of time. Few pitied them. Hatred and threats was their portion.

Since international law seemed unable to prevent the internment of enemy aliens, although it was recognized to be contrary to custom and even to the most firmly established legal principles, it was felt that it should, at least, be governed by rules to mitigate its evils.

The Draft International Convention concerning the Condition and the Protection of Civilians of Enemy Nationality in the Territory of a Belligerent or in Territory occupied by it, which was approved by the Fifteenth International Conference of the Red Cross, held in Tokyo in October 1934, stipulated that the internment of enemy civilians may be ordered only for those eligible for immediate mobilization or mobilization within a year, or where the security of the detaining power so required, or the situation of the enemy civilians rendered it necessary. Civilians who did not come under any of these three headings were neither to be interned nor prevented from leaving the country.

The Tokyo Draft was never approved by a Diplomatic Conference. In the Second World War, at least in Europe and Japan, most civilians

who were in enemy territory when war broke out, were interned. It, therefore, fell to the Diplomatic Conference of 1949 to adopt rules on internment, but it did so only to the limited extent of Article 35, paragraph 1, of the fourth Convention which reads:

> *All protected persons who may desire to leave the territory (of a party to the conflict) at the outset of or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the state…*

Any state is, therefore, entitled to prevent enemy aliens from leaving its territory if it considers their departure contrary to its national interests, and to intern them or place them in assigned residence if it considers this absolutely necessary to its security. These provisions largely leave the state of residence to make its own unilateral assessment. In practice, on the outbreak of hostilities each belligerent may be expected to order most or all enemy nationals on its territory to be interned as a precaution or for any other reason, and to release some of them later after investigating individual□s cases as prescribed by the Fourth Convention.

Similarly, the occupying power is entitled to place in assigned residence or intern protected persons who are in an occupied territory, if it considers such measures necessary for imperative reasons of security, or if they have committed offences. The provisions for the release of internees also leave the decision to the unilateral discretion of the detaining authority, as is clear from Article 132 of the Fourth Convention which reads:

> *Each interned person shall be released by the Detaining power as soon as the reasons which necessitated his internment no longer exist.*

The parties to the conflict shall, moreover, Endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

Apart from the bilateral agreements mentioned in the second paragraph of this article, which are generally concluded only after arduous negotiations, whether or not internees are released during hostilities will depend largely on the detaining authority□s goodwill. Although the relevant provisions are vaguely worded, it is to be hoped that a modicum of humanity, and above all, the obvious absurdity of interning and maintaining a host of inoffensive civilians, will lead to the release of all persons who cannot enhance their home country□s economic and military potential.

The issues and issues discussed above are immediately applicable only in international armed conflicts. In non-international armed conflicts, the only immediately applicable provisions are Article 3 common to all four 1949 Conventions and, for the states party thereto, Protocol II additional to those Conventions. Neither Article 3 nor protocols II, however, stipulate that prisoners, whether wounded or able-bodied, must be released during hostilities. Yet the parties to a conflict are not entirely free to act as they please in that regard, for both common Article 3 and Protocol II do stipulate that persons taking no direct part in hostilities, including persons deprived of liberty, shall in all circumstances be treated humanely. Article 3 also lays down that □the wounded and sick shall be collected and cared for□. If, therefore, one of the warring parties cannot ensure that the prisoners in its hands are humanely treated, and especially that wounded and

sick prisoners receive the care that their state of health requires, it is bound to release them. Otherwise, it must be admired that the parties to an internal conflict are under no obligation to set their prisoners free during hostilities. If they do so, it will be entirely at their discretion or under special agreements.

This is not a vain hope as several operations for the release of prisoners have been carried out with the International committee's assistance or under its auspices. The most remarkable precedent for them is undoubtedly the unilateral release of Cuban prisoners at the suggestion of Fidel Castro some months before the fall of the Batista regime. On 4 July 1958, Fidel Castro, then commanding the rebel forces in the Sierra Maestra, asked the ICRC to co-operate in handling over to the Cuban Red Cross seriously wounded members of the government forces captured by the insurgents who could not give them the medical care they required because of measures taken by the Batista government to prevent the sending of supplies to rebel-controlled areas. The ICRC sent out two delegates who made radio contact with the insurgents which led to an agreement to conclude a truce. The delegates escorted a government medical convoy to the meeting place chosen by the insurgents in the *sierra maestra*. On 23 and 24 July 1958, at Las Vegas de Jibacoa, the insurgents unilaterally released fifty-seven seriously wounded prisoners and 196 other prisoners in bad health.

Since then, there have been similar operations in internal conflicts. Despite such precedents, both in international or internal conflicts, most prisoners can have little hope of being released and returning home before the end of hostilities.

Repatriation operations during hostilities allow those prisoners least able to bear captivity, especially those who are seriously wounded or

seriously ill, to return to their country and home. They are, however, a minority, and the overwhelming majority of prisoners will not be set free until the end of hostilities.

There have been long periods of history where they could not even hope for that. In the ancient world, prisoners who were not put to death were usually enslaved for the rest of their lives. Only exceptionally, as when the Athenians and Lacedaemonians concluded the Peace of Nicias in 421 BC, did a negotiated peace make an exchange of prisoners possible. In the Meddle Ages, the custom of ransom enabled prisoners to put back their freedom if they could afford to do so. The fate of other prisoners depended wholly on the clemency of the victor.

Only with the emergence of the nation-state and rise of professional armies did an exchange of prisoners of war come to be seen as a natural consequence of the restoration of peace. This rule is laid down in Article LXIII of the Treaty of Munster of 30 January 1648, which ended the Thirty years War, as follows: All prisoners of war shall be released on either side without payment of ransom and without any distinction or reservation…

Thereafter that rule went unquestioned. Practically all the peace treaties signed in the eighteenth and nineteenth centuries provided for the release of prisoners of war on either side, irrespective of number and rank, and without ransom.

This rule is codified by Article 20 of the Hague Regulations of 18 October 1907, which reads: After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible’.

However, for this firmly established rule to be effective, peace had to be concluded without undue delay. This did not happen at the end of the First World War. In the armistice agreements, the Allies compelled the defeated countries to release all the prisoners in their hands immediately and without reciprocity, whereas the repatriation of German, Austrian, Hungarian, Bulgarian and Turkish prisoners was to be arranged only on conclusion of the peace preliminaries. There were, of course, no such preliminaries and the peace treaties were concluded only after interminable delays. Moreover, Article 214 of the Treaty of Versailles made the repatriation of German prisoners conditional on the entry into force of the treaty, and the peace treaties with Austria, Hungary, Bulgaria and Turkey contained similar provisions. Since the Treaty of Versailles entered into force only on 10 January 1920, as many as 425 days lapsed between the end of hostilities and the beginning of the general repatriation of prisoners of war belonging to the former Central Powers.

The Diplomatic Conference of 1929 reacted hardly at all to these circumstances. Thus Article 75, paragraph 1, of the Prisoner-of-war Code reads as follows:

> *When belligerents conclude an armistice convention, they shall normally cause to be included there in provisions concerning the repatriation of prisoners of war. If it has not been possible to*
>
> > *insert in that convention such stipulations, the belligerents shall, nevertheless, enter in to communication with each other on the question as soon as possible. In any case, the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace.*

The *de facto* situation at the end of the Second World War once again foiled the legislator's intentions, for the Allies forced Germany and Japan to surrender unconditionally and there was, therefore, no armistice and no peace treaty. Some states, such as France and the Soviet Union, took advantage of this to retain the prisoners in their hands for several years longer. As there was no reason to fear that hostilities would be resumed, this was a gross perversion of the purpose of war captivity. Originally a security measure, it became a disguised forced labor service foisted on former enemy soldiers as war reparations. Four years after the fighting had ceased, and at the very time when the Diplomatic Conference was meeting to revise the humanitarian rules, tens of thousands of prisoners of war were still waiting to be set free.

Deeply concerned about this situation, the 1949 Conference adopted a resolutely new provision linking the release of prisoners of war not, as previously, to a formal condition-the conclusion of a peace treaty-but to a *de facto* situation, namely the end of active hostilities. Thus, Article 118, paragraph 1, of the Third Convention stipulates that: "prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."

This wording, as clear-cut as a newly minted coin, was thought to leave no room for doubt, but before long, its interpretation was the subject of dispute on two counts: The first one is, What is the exact meaning of the phrase "cessation of active hostilities"? When hostilities do not end by a capitulation making any resumption of fighting impossible, as in 1945, but by an armistice or some kind of cease fire that either side can break at any moment, must the belligerents release prisoners of war who may take up arms again if the armistice or cease-fire does not hold? And the second, what are the obligations of the detaining power if some prisoners of war do not

wish to be repatriated? Must it use force to repatriate prisoners who refuse to go back to their home country?

No attempt will be made to answer these questions here. Much has already been written about them, and an in-depth analysis would be beyond the scope of the present material study. Suffice it to say that Article 118 of the Third Convention links the repatriation of prisoners of war to the *de facto* end of the fighting, and that, therefore, any armistice agreement, or any suspension of hostilities for an indefinite period, entails the obligation to release and repatriate enemy prisoners. It has also been provided that violence should never be used to return to their own country prisoners of war who do not wish to be repatriated. It has never taken part, or required its delegates to take part, in repatriations involving any form of compulsion.

Review Questions

☻ What do you think is the reason behind confinement of prisoners of war?

☻ What is the significance of Geneva Convention of 6 July 1906 with regard to the right of belligerents to retain those wounded enemy servicemen whom they considered important to have in their possession? What about Article 68 of the POW Convention that was adopted during the Diplomatic Conference of 1929? What about the Diplomatic Conference of 1949?

☻ What are the principles to be applied as criteria for repatriating prisoners of war? What is it that the Diplomatic Conference of 1949 contributed in terms of introducing a better practice?

☻ What is the role of the neutral powers in the repatriation of prisoners of war?

☻ What is the rule with regard to capturing and retaining medical personnel?

☻ Is there any rule in IHL that deals with internment of enemy civilians? Explain Is there any rule to be applicable in the case of Non-International Armed Conflict to govern the situation?

☻ Briefly explain the history of repatriation of prisoners of war.

CHAPTER FOUR: The Protection of Wounded, Sick, and Shipwrecked Members of the Armed Forces

4.1 Protection against the Effects of Hostilities

The Geneva Convention of 22 August 1864 declared in Article 6 that wounded and sick combatants to whatever nation they may belong, shall be collected and cared for. This is the underlying principle of the entire Convention, and indeed of the whole of the Law of Geneva.

However, for wounded or sick members of the armed forces to be collected and given the treatment their condition requires, they must be shielded from the effects of hostilities and those who seek to help them must not come under fire. How, then are wounded and sick military personnel to be protected? This question is crucial, for it is no good going to the rescue of the wounded, whether friend or foe, if they then remain exposed to the violence of war.

Clearly, the principle involved here is that of the inviolability of wounded and sick military personnel and of medical personnel and equipment. But how far does their inviolability extend, and what can the International Committee of Red Cross do to help ensure that it is respected?

Basically, there are two particular cases of implementation of the principle of inviolability of the wounded and sick first, *ratione loci:*

hospital zones and localities; and second *ratione temporis*: truces and evacuations.

The principle of immunity of wounded and sick members of armed forces is laid down by Article 12 of the first Geneva Convention of 12 August 1949, which states: "Members of the armed forces". who are wounded or sick shall be respected and protected in all circumstances." The whole Convention rests on this fundamental principle that military personnel compelled by wounds or sickness to lay down their arms may not be attacked, but must be respected and protected, no matter to whichever party they may belong.

The same principle is expressed by Article 10 of Protocol I, which restates the law in force. It reads:

> *All the wounded, sick and shipwrecked, to whichever party they belong, shall be respected and protected.*
>
> *In all circumstances they shall be treated humanely and shall receive, to the attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.*

With regard to non-international armed conflicts, the immunity of wounded and sick combatants is laid down in Article 3 of the 1949 Conventions:

> *Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.*

The same article provides that the wounded and sick shall be collected and cared for. This principle is confirmed by Article 7 of Protocol II, which reproduces almost word for word the text of Article 10 of Protocol I, as follows:

> *All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.*
>
> *In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.*

The principle that wounded and sick military personnel are inviolable is, thus, firmly rooted in treaty law. It applies to international and non-international conflicts alike.

This principle imposes two kinds of obligations upon the belligerents, which are expressed in the injunction to "respect" and "protect" as laid down by the Conventions and Protocols. The first obligation, respect, is the duty to refrain from certain acts; it forbids attacks on, or other acts of violence against the wounded and sick. The second obligation, protection, is a duty to act. It requires the belligerents to take all precautions in attack and defense so as to avoid exposing wounded and sick military personnel gratuitously to danger; to remove them from the fighting and evacuate them; and to protect them from theft and pillage.

However, the wounded and sick cannot be given the protection that is their due, or be collected and cared for unless medical personnel are likewise respected and medical installations are spared. The immunity of medical personnel and installations from attack is, therefore, a corollary of the principle that the wounded and sick in armed forces are inviolable. Provision is made for this immunity in international armed conflicts by Articles 19 to 35 of the First Convention.

In non-international armed conflicts, the immunity of medical personnel and installations follows logically from the obligation of either party to collect and care for the wounded and sick. If one side attacks the other side's medical personnel or prevents them from carrying out their errands of mercy, obviously it is contravening that obligation. But, immunity is not expressly laid down in the minimal set of provisions contained in Article 3. The regrettable consequences of this omission soon became evident, and the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law took care to remedy it. Article 9 of Protocol II accordingly stipulates that:-

> *Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.*
> *In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.*

For medical personnel to be able to do their job properly, it is not enough to protect them against the hazards of battle; the belligerents must also refrain from obstructing their work. The most common impediment of all and the most likely to bring the work of medical services to a standstill, is captivity. If doctors, medical orderlies and nurses are thrown into camps and fortresses pell-mell with prisoners of war, they can do nothing for the wounded lying on the field of battle. This raises the question of the retention of medical personnel who fall into enemy hands.

The 1864 Conference settled the issue in the clearest possible way: it ruled that medical personnel were not to be taken prisoner; that even under enemy occupation, they must be freely able to continue their work of tending the wounded and sick; and that when their care was no longer required, they were to be handed over to the outposts of their own armed forces.

In the two world wars, however, the belligerents found it necessary to retain some or all captured medical personnel to look after prisoners of war of their own nationality. In some cases, the warring parties came to an agreement on the number of doctors, medical orderlies and nurses, in proportion to the total number of prisons to be retained.

This kind of solution was endorsed by the 1949 Conference after a lively and fertile debate. Thus, Article 28 of the First Convention states that:

> *Personnel designated in Article 24 and 26 who fall into the hands of the adverse party, shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require.*
>
> *Personnel thus retained shall not be deemed prisoners of war. Nevertheless they shall at least benefit by all the provisions of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 within the framework of the military laws and regulations of the Detaining Power. In addition, under the authority of its competent service, they shall continue to carry out, in accordance with their professional ethics, their medical and spiritual duties on behalf of prisoners of war,*

preferably those of the armed forces to which they themselves belong.

The article also defines the facilities to be granted to medical personnel retained to tend prisoners of war. Medical personnel not required for that purpose must be returned to their own side's armed forces as soon as a road is open for their return, in accordance with Article 30, paragraph 1 which reads:

Personnel whose retention is not indispensable by virtue of the provisions of Article 28 shall be returned to the party to the conflict to whom they belong, as soon as a road is open for their return and military requirements permit.

These provisions apply *ipso jure* only to international armed conflicts. In situations of internal conflict, the belligerents are under no obligation to set medical personnel free even when they are not needed to tend military and civilian prisoners.

Captivity, however, is not the only possible obstruction; wounded and sick members of the armed forces are likely to be left to their fate if the very people whose task is to collect and care for them are liable to prosecution for so doing. The protection of military wounded and sick necessarily depends on respect for the principle of neutrality of medical care.

Such care is protected by Article 18, Paragraph 3, of the First Convention: "No-one may ever be molested or convicted for having nursed the wounded or sick". This rule is confirmed by Article 16, Paragraph 1, of Protocol I which provides: "Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting there from."

Do these provisions also protect the doctor's duty to preserve the confidentiality of his patients' medical history? If they do not, wounded or sick persons may have to forgo necessary medical attention for fear of being reported to the enemy.

The 1949 Conventions are silent on this point. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law tried to settle the question, but did so in a way that protects the medical services only from investigation and prosecution by the adverse party. Thus, Article 16, Paragraph 3, of Protocol I stipulates that:

> *No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse party, or to his own party except as required by the law of the latter party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, are or who have been, under his care, if such information would, in his opinion, prove harmful to patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.*

In other words, if the law were to require compulsory notification of suspect wounds, medical confidentiality would not longer be protected.

The above rules apply only to international conflict. However, the risk of attempts by each side to try to weaken the other by rendering its medical services inoperative is the greatest in civil wars, or in mixed conflicts combining characteristics of both internal and international conflict, since the opposing forces are at such close quarters and their

resources are often unequal. It is also in situations such as these where clandestine activity tends to be the rules that each side is likely to order its medical services to report all suspect wounds in the hope of rooting out undercover fighters.

Only Article 3 is immediately applicable. It stipulates that: "The wounded and sick shall be collected and cared for", and thus unquestionably forbids any attack on medical personnel. Conversely, it does not forbid other means of hindering the work of an adversary's medical services in order to deprive enemy combatants of necessary medical care. The Nineteenth International Conference of the Red Cross, which met in New Delhi in October and November 1957, tried to fill this gap by adopting the following resolution:

> *The XIXth International Conference of the Red Cross, considering the efforts already made by the International Committee of the Red Cross to minimize the suffering caused by armed conflicts of all types, expresses the wish that a new provision be added to the existing Geneva Conventions of 1949, extending the provisions of Article 3 there of so that:*
>
> *a) The wounded may be cared for without discrimination and doctors in no way hindered when giving the care which they are called upon to provide in these circumstances,*
>
> *b) The inviolable principle of medical professional secrecy may be respected*
>
> c) *There may be no restrictions, other than those provided by international legislation, on the sale and free circulation of medicines, it being understood that these will be used exclusively for therapeutic purposes,*

Furthermore, makes an urgent appeal to all Governments to repeal any measures which might be contrary to the present Resolution.

The New Delhi Conference was unmistakably pointing the way for a future development of the law. It was, therefore upto the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law to incorporate these recommendations into positive law though it did so only to a very limited extent.

Review Questions

☻ How do you explain the principle of inviolability of wounded and sick military personnel and of medical personnel and equipment? Is there any mechanism designed to ensure their implementation?

☻ Is there any legal basis for protecting wounded and sick combatants?

☻ What are the two fundamental obligations that the principle of inviolability of the wounded and sick impose on the belligerents? Explain each

☻ What is the significance of the protection of medical personnel and installations for protecting the wounded and sick? What is the protection provided for them?

☻ Do medical personnel enjoy protection against punishment and also being compelled to hand over confidential information of his patient?

4.2 Protection against Arbitrary Treatment

Another rule which is also established by state practice as a norm of customary international law applicable in both international and non-international armed conflicts is the rule against arbitrary treatment of

the wounded, sick and shipwrecked members of the armed force. When ever circumstances permit and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction. The principle of non- discrimination between the wounded, sick and shipwrecked members of the armed force, in whatever ground, provides that protection must be given to all equally and no one in these conditions is be treated arbitrarily.

The duty to collect wounded and sick combatants without distinction in international armed conflicts was first codified in the 1864 Geneva Convention. This subject is dealt with in more detail in the 1949 Geneva Conventions. This duty is now codified in Article 10 of Additional Protocol I, albeit in more general terms of "Protecting" the wounded, sick and shipwrecked, which means "coming to their defense, lending help and support".

The numerous military manual which contain this rule are phrased in general terms covering all wounded, sick and shipwrecked, whether military or civilian. The legislations of many states, especially that of Sweden, have explicitly recognized this rule as a customary international law and even have provided for the punishment of persons who abandon the wounded, sick and shipwrecked.

In the context of non-international armed conflicts, this rule is based on common Article 3 of the Geneva Conventions, which provides that "the wounded and sick shall be collected". It is codified in a more detailed manner in Additional Protocol II. In addition, it is set forth in a number of other instruments also pertaining to non-international armed conflicts.

The duty to search for, collect and evacuate the wounded, sick and shipwrecked is contained in a number of military manuals which are applicable in or have been applied in non-international armed conflicts. It is an offence under the legislation of several states to abandon the wounded and sick.

No official contrary practice was found with respect to either international or non-international armed conflicts. The ICRC has called on parties to both international and non-international armed conflicts to respect this rule and refrain from any arbitrary treatment of these people.

The obligation to search for, collect and evacuate the wounded, sick and shipwrecked is an obligation of means. Each party to the conflict has to take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked. This includes permitting humanitarian organizations to assist in their search and collection. Practice shows that the ICRC in particular has engaged in the evacuation of the wounded and sick. It is clear that in practice humanitarian organizations will need permission from the party in control of a certain area to carry out such activities, but such permission must not be denied arbitrarily. The UN Security Council, UN General Assembly and UN Commission on Human Rights, for example, have called upon the parties to the conflicts in El Salvador and Lebanon to permit the ICRC to evacuate the wounded and sick.

In addition, the possibility of calling upon the civilian population to assist in the search, collection and evacuation of the wounded, sick and shipwrecked is recognized in the Geneva Conventions and their Additional Protocols and is also provided for in several military manuals. Article 18 of the First Geneva Convention provides that □no one may ever be molested or convicted for having nursed the

wounded or sick. This principle is also set forth in Article 17(1) of Additional Protocol I, to which no reservations have been made.

The Geneva Conventions and other instruments, such as the UN secretary-General's Bulletin on observance by United Nations forces of international humanitarian law, state that cease-fires and other local arrangements are seen as appropriate ways to create the conditions in which the wounded and sick can be evacuated and require the parties to the conflict to conclude such agreements, whenever circumstances permit, to remove, exchange and transport the wounded from the battlefield.

This rule applies to all wounded, sick and shipwrecked, without adverse distinction. This means that it applies to the wounded, sick and shipwrecked regardless of which party they belong, to but also regardless of whether or not they have taken a direct part in hostilities. The application of this rule to civilians was already the case pursuant to Article 16 of the Fourth Geneva Convention, which applies to the whole of the populations of the countries in conflict; and is repeated in Article 10 of Additional protocol I. With respect to non-international armed conflicts, common Article 3 of the Geneva Conventions applies to all persons taking no active part in the hostilities, including civilians. In addition, Article 8 of Additional Protocol II does not indicate any distinction. The same obligation is provided in most military manuals which state this rule in general terms.

The other rule relating to protection of the wounded, sick and shipwreck members of the armed force against arbitrary treatment, which is established as a norm of customary international law applicable in both international and non-international armed conflicts, relates to the medical care and attention that they need. The

wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. Again no distinction may be made among them founded on any grounds other than medical ones.

The duty to care for wounded and sick combatants without distinction is a long-standing rule of customary international law already recognized in the Lieber Code and codified in the 1864 Geneva Convention. This subject is also dealt with in more detail by the 1949 Geneva Conventions and is codified in Article 10 of Additional Protocol I.

The numerous military manuals which contain this rule are phrased in general terms covering all wounded, sick and shipwrecked. To deny medical care to the wounded, sick and shipwrecked is also an offence under the legislation of many states.

The duty to care for wounded and sick combatants without distinction is set forth in a number of military manuals which are applicable in or have been applied in non-international armed conflicts. Under the legislation of many states where there is non-international armed conflict, it is an offence to deny medical care to the wounded, sick and shipwrecked. Respect for this rule was required by Argentina□s National Court of Appeals in the Military Junta case in 1985. Furthermore, there are official statements and other practice supporting this rule in the context of non-international armed conflicts.

The obligation to protect and care for the wounded, sick and shipwrecked is an obligation of means. Each party to the conflict must use its best efforts to provide protection and care for the wounded,

sick and shipwrecked, including permitting humanitarian organizations to provide for their protection and care.

In addition, the possibility of calling on the civilian population to assist in the care of the wounded, sick and shipwrecked is recognized in practice. Aid offered by the civilian population is recognized by the 1864 Geneva Convention, the first Geneva Convention and Additional Protocols I and II. This possibility is also recognized in a number of military manuals.

The most important rule on protection against arbitrary treatment providing that no distinction may be made among the wounded, sick and shipwrecked except on medical grounds is often expressed in international humanitarian law as a prohibition of adverse distinction. This means that a distinction may be made which is beneficial, in particular by treating persons requiring urgent medical attention first, without this being a discriminatory treatment between those treated first and those treated afterwards. This principle is set forth in many military manuals. It is also supported by the requirement of respect for medical ethics, as set forth in Additional Protocols I and II, to the effect that medical personnel may not be required to give priority to any person, except on medical grounds.

And finally, let us see what the rule specifically on the protection against arbitrary treatment provides. This rule, which is also established as a norm of customary international law applicable in both international and non-international armed conflicts, stipulates that each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property.

The obligation to take all possible measures to protect the wounded, sick and shipwrecked from pillage and ill-treatment in the context of international armed conflicts was first codified in the 1906 Geneva Conventions, and the 1907 Hague Convention and is now set forth in the 1949 Geneva Conventions.

Numerous military manuals refer to the duty to take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and pillage. In particular, many manuals prohibit pillage of the wounded, sick and shipwrecked, sometimes referred to as □marauding□ or specify that it constitutes a war crime.

The obligation to take all possible measures to protect the wounded, sick and shipwrecked from pillage and ill-treatment in non-international armed conflicts is set forth in Additional Protocol II. In addition, it is contained in a number of other instruments pertaining also to non-international armed conflicts.

A number of military manuals which are applicable in or have been applied in non-international armed conflicts prohibit pillage and ill-treatment of the wounded, sick and shipwrecked or specify the obligation to take all possible measures to protect them from pillage and ill-treatment.

Practice further indicates that civilians have a duty to respect the wounded, sick and shipwrecked. With respect to international armed conflicts, this principle is set forth in Article 18 of the First Geneva Convention and in Article 17 of Additional Protocol I. It is also stated in a number of military manuals. Sweden□s IHL Manual, in particular, identifies Article 17 of Additional Protocol I as a codification of

customary international law. The Commentary on the Additional Protocols with respect to Article 17 of Additional Protocol I notes that:

> *The duty imposed here upon the civilian population is only to respect the wounded, sick and shipwrecked, and not to protect them. Thus it is, above all, an obligation to refrain from action, i.e. to commit no act of violence against the wounded or take advantage of their condition. There is no positive obligation to assist a wounded person. Though obviously the possibility of imposing such an obligation remains open for national legislation, and in several countries the law has indeed provided for the obligation to assist persons who are in danger, no pain of penal sanctions.*

The duty of civilians to respect the wounded, sick and shipwrecked also applies in non-international armed conflicts because non-respect would be a violation of the fundamental guarantees accorded to all persons *hors de combat*. Under the statute of the International Criminal Court, it is a war crime for anyone to kill or wound a person *hors de combat* whether in international or non-international armed conflicts.

Review Questions

☻ What does IHL provide with regard to searching, collection and evacuation of the wounded, sick and shipwrecked?

☻ Does the rule on treatment of wounded, sick and shipwrecked allow a distinction to be made on any ground? Explain

☻ Are there any legal basis for protecting the wounded, sick and shipwrecked from pillage and ill-treatment? What about in non-international armed conflicts?

☻Is there any duty on civilians with regards to the treatment of the

wounded, sick and shipwrecked?

Chapter Five: Protection of Civilian

5.1 Protection of Civilian Population against the Effects of Hostilities

Beyond question, the general principle that the civilian population shall be immune from the effects of the hostilities is above all based on customary law; it meets a fundamental requirement of humanity

and civilization, and was accepted by legal opinion and state practice long before being confirmed in treaties. Its development can, however, be most easily followed through the various stages of its codification.

The main legal bases underlying this rule are Articles 25 to 28 of the Hague Regulations. To have a glance at them, the first provision in this part says that the attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited. The second one, i.e. Article 26, provides that officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

Art. 27, on the other hand, states that in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art science, or charitable purpose, historical monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purpose...Finally, Art. 28 provides that the pillage of town or place even when taken by assaults is prohibited.

Something very important about all these provisions is that, as codification of customary law, they are binding on all members of the international community whether or not they are parties to the Hague Convention (IV) of 18 October 1907.

As regards to bombardment by naval forces, the principles that the civilian population is immune from attack is enshrined in Articles 1 and 2 the Hague Convention (IX) of 18 October 1970. Article 1

provides: *the bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden*

Article 2, on the other hand, states: " *military works, military or naval establishments, depots of arms or war materiel, workshops or plants which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable time of waiting, if all other means are impossibility and when the local authorities have not themselves destroyed them with in the time fixed. He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances*.

The difference between the two sets of protective rules is obvious. Whereas the rules applicable to war on land are based on the distinction between defended and undefended localities, those applicable to war at sea are concerned first and foremost with the notion of military objective.

This difference is easily explained. An officer commanding an army in the field has every possibility of seizing an undefended locality and destroying or taking over any installations of military interest there. To bombard it would, therefore, cause damage that no military interest could justify.

A fleet commander, on the other hand, would not normally be able to seize an enemy locality, even if it were undefended, in order to destroy or take possession of any military resources there. He may, therefore, legitimately bombard it provided the bombardment is restricted to military objectives.

Except for the requirement of a prior summons (notification), which is impracticable in modern warfare, these principles are still as valid as ever in their respective contexts.

On the other hand, the very notion of "undefended locality" became largely meaningless with the emergence of continuous fronts. Could any town or village behind the enemy lines still be styled an undefended locality? Could it legitimately be destroyed by long-range artillery or air bombardment simply because it lay behind the lines?

These questions were far from being settled when the First World War broke out. The air forces of both sides bombed not only objectives in support of ground and naval forces, but also objectives outside the actual combat zone. The belligerents usually tried to justify their bombing of towns in rear areas by representing them as reprisals.

The failure of the Disarmament Conference (Geneva, 1932-4), followed by increasingly murderous bombardments in the Spanish Civil War and the Sino-Japanese conflict, gave a fresh impetus to efforts to protect the civilian population. In a resolution adopted on 30 September 1938, the League of Nations Assembly stressed the need to adopt regulations specially adapted to air warfare, and recognized that the following three principles were an integral part of positive international law and must serve as a basis for any subsequent regulations:

1) The intentional bombing of civilian populations is illegal;
2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable;
3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighborhood are not bombed through negligence.

Unfortunately, the authority of this resolution was undermined because the three protagonists it was intended to call to order- Germany, Italy and Japan - were not present, and because the two all-important questions of defining the civilian population and legitimate objectives had been shirked.

A general limitation of aerial bombardment was not on the agenda of the 1949 Diplomatic Conference, which discussed it only marginally. The Conference did, however, establish rules for the special protection of civilian medical personnel and installations, and of hospital zoned and localities as well as safety zones. In spite of all statements to the contrary, its decision to do so reflected the loss of authority of the general principle that the civilian population shall be immune from the effects of hostilities.

Whereas the Diplomatic Conference has revised every detail of the rules protecting war victims, serious doubts remained as to whether the general principle of the civilian population□s immunity from attack was still valid. Yet, much of humanitarian law, including the Fourth Convention just adopted by the Conference, rests on that very principle.

It was foreseeable that, in the long term, this contradiction would sap the authority of the Law of Geneva. Extremely alarmed by this prospect, the International Committee of Red Cross took action on two fronts which, although interrelated, are best considered separately for the sake of clarity. They are: (i) the prohibition of weapons of mass destruction (atomic, bacteriological and chemical weapons); and (ii) restoration of the principle of immunity of the civilian population from the effects of hostilities.

Review Questions

☻ What rules does IHL provide with regard to protecting the civilians during attack?

☻ What are the two sets of protective rules to be applied to war on land and war at sea? What is the significance of these distinctions, specially with regard to the duty on the commanders to take necessary measures to protect civilians?

☻ Discuss the endeavors to set rules for air warfare.

5.2 Protection of Civilians against Arbitrary Treatment

Protection of civilians has always been at the heart of IHL and, hence, it is always an issue in any armed conflict whether international, non-international or internationalized. This is reflected in Article 5 of GC IV and Article 75 of Additional Protocol I.

As it has been shown in the foregoing parts of this material, only members of armed forces have the right to participate in hostilities and civilians are prohibited from doing so. Any act of civilians contrary to this principle entails a serious consequence in the protection enjoyed by them. Assuming that they have complied with what they are required to, there are a wide range of protection that they are entitled to enjoy. One and perhaps the most important of these is protection against arbitrary treatment.

The above cited provisions of the GC IV and AP I have essentially provide that the civilians concerned shall be treated humanely and shall have the right to a regular and fair judicial procedure. This

makes the ground rules in any armed conflict with regard to the treatment of civilians. Hence, this establishes the principle that civilians are protected against any arbitrary treatment.

Article 51 Paragraph 3 of AP I and Article 13, Paragraph 3 of AP II stipulate in identical terms that civilians are entitled to immunity unless and for such time as they take a direct part in hostilities. It seems that it is important to give some special attention to this particular situation leading to suspension or removal of the immunity enjoyed by civilians. The first question to be asked in this case as to what constitutes taking a direct part in hostilities.

Civilians who directly carry out a hostile act against the adversary may be restricted by force. A civilian who kills or takes prisoners, destroys military equipments or gathers information in the area of operations may be made the subject of attack. The same applies to a civilian who operates the weapon system, supervises such operation or services such equipment. The transmission of information concerning targets directly intended for the use of a weapon is also considered as taking direct part in hostilities. Furthermore, the logistics of military operations are among the activities prohibited to civilians.

It follows, therefore, that not only direct and personal involvement but also even preparation for military operation and intention to take part therein may suspend the immunity of civilians. All of these activities, however, must be proved to be directly related to hostilities or, in other words represent direct threat to the enemy.

Even when this is the case it doesn't mean that they are to be treated arbitrarily. There are rules as to how civilians are to be treated in all

situations they may undergo during the course of hostility. While they take direct part in hostilities, they may be resisted by all lawful means of warfare for combating enemy armed forces. Ones they are *hors de combat,* they must once again be treated according to the rules applying to civilians, since they have not lost their civilian status. They may be taken prisoner and subjected to criminal proceeding and depending on the circumstance either the provisions dealing with foreigners on the territory of a party to a conflict or the law of belligerent occupation apply.

Civilians who have taken part in hostilities and are taken prisoner are, in particular, not entitled to prisoners of war status. The detaining power may, however decide to treat civilians who fought like "real" combatants and in accordance with the law of war as prisoners of war applying the provisions of GCII accordingly. Experience from many conflicts, especially civil wars with foreign intervention, has shown that such measures can be justified not only from the humanitarian standpoint but also from the view point of military considerations.

The fulfillment of the above mentioned conditions temporarily releases the detaining power from the obligation to respect GC IV in relation to this person. This is also only to the extent that these right "would, if exercised in favor of such individual person, be prejudicial to the security of such state" as clearly enshrined in Article 5 Para. 1 of GC IV, which is only on the right to have contact with the outside world i.e. incommunicado detention.

In contrast, the fundamental guarantee of international humanitarian law, as they specially apply to detained persons, may never be questioned. To respect these rights is in no circumstances "prejudicial to the security of such state". In close alliance with international law

on human rights, Article 75 of AP I has codified the fundamental guarantee making up the minimum standard to which everyone, without exception, is entitled. Even spies and saboteurs fall into this humanitarian safety net

The point that we are trying to figure out in this discussion is that we are trying to show the exceptional situations that may lead to suspension of the protection of civilians and the way they are to be treated during such a condition. But in all other circumstances where there is no either direct or indirect participation in the act of hostility by the civilians, there is nothing that affects the rule enshrined in GC IV and AP I saying civilians concerned shall be treated humanely and shall have the right to a regular and fair judicial procedure. This means any arbitrary treatment of civilians contrary to these principles becomes violation of these rules.

Review Questions

☻ Discuss the legal basis for the protection of civilians against arbitrary treatment.

☻ What does immunity of civilians have to do with the protection they enjoy against arbitrary treatment?

☻ It seems that civilians who participated in the act of hostility do not have whatsoever kind of protection under IHL for they failed to discharge their duty, which is to abstain from taking part in hostility either directly or indirectly. Do you agree with this idea? Why?

5.3 Protection of Refugees

Consistent and full observance of the principles of International Humanitarian Law is believed to prevent most population movements resulting from armed conflict. Because there are fundamental rules to safeguard them against direct or reprisal attack on civilians including those intended to spread terror among the population and against starvation of civilians, as provided in clear terms in Articles 51 and 54 of Additional Protocol I.

Article 17 of Additional Protocol II, which is on non- international armed conflicts, provides a general prohibition of forced movements of civilians while IHL of international armed conflict creates some general prohibition for occupied territories. Basically, the situation of population movement may also occur due to reasons other than armed conflicts and hence, IHL provides protection to both displaced persons and refugees.

Displaced persons are civilians fleeing with in their own territory for reasons such as armed conflict. Geneva Convention IV Art. 23 and Additional Protocol I Art. 70 indicate that IHL protects those displaced due to international armed conflict by, for example, granting the right to receive items essential to survival. With regard to civilians displaced by internal armed conflict, Common Article 3 provides similar but less detailed protection.

Refugees, in contrast, consist of those who fled from their country. IHL protects these individuals, as civilians affected by hostilities, only if they fled to a state taking part in an international armed conflicts, or if that state is beset by an internal armed conflict as governed by Common Article 3.
The 1953 UN Convention relating to the status of refugees and its 1967 Protocol define a refugee in much narrower terms as one fleeing

persecution. Only the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa includes people fleeing armed conflicts under the concept of refugee. Hence, civilians must rely upon these conventions and the United Nations High Commissioner for Refugees for protection and benefits when fleeing to territory not involved in armed conflict since IHL is inapplicable in such a situation.

IHL specifically protects refugees entering the territory of an enemy state against unfavorable treatment based on their nationality. Those considered refugees prior to the outbreak of hostilities, including those from neutral state, are always considered protected persons under IHL of international armed conflict which also provides special guarantee to those who fled to a territory which becomes occupied by the state of which they are nationals. GC IV Art 45(4) contains another important provision with regard to non-refoulement. It expressly provides that protected persons may not be transferred to a state where they fear persecution for political or religious reasons.

Review Questions

☻ How does IHL protect those displaced due to an international armed conflict? What about internal armed conflict?

☻ How do you define refugees? Are there any requirements that have to be fulfilled to grant someone a status of refugee?

☻ How is the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa different in defining refugees?

5.4 Special Rules on Occupied Territories

The international law of belligerent occupation lays down special rules on the rights and obligations of the belligerent power in occupation of foreign territory. The law of belligerent occupation has undergone major development over the past few centuries. While the population of such territories originally had virtually no rights at all, their status and rights have now been greatly improved and are securely anchored in international law.

The first codification of international rules relating to belligerent occupation can be found in the HagueRegs, which themselves were built on customary international law. As the Military Tribunal of Nuremberg laid down in its judgment, the contents of the HagueReg were already considered to be customary law during the Second World War. This also covers the provisions relating to occupied territories. Many lessons drawn from the crimes committed in the occupied territories of Europe and the Far East found their expression in GC IV, which codifies a major part of modern international law applicable to a belligerent occupation.

The reformulation of the international law of belligerent occupation by GC IV has been accompanied by a strong upswing in the law on human rights. The treatment of the population of an occupied territory is thus in practice increasingly measured against the standard of human rights. However, the provisions of GC IV and the relevant rules of customary law take precedence as law specifically regulating belligerent occupation.

The sources of the law of belligerent occupation are Articles 42-56 HagueReg; GC IV, especially Articles 27-34 and 47-78; and also general principles of international and customary law. Although

Article 154 GC IV states that the new law of 1949 simply complements the HagueReg, Articles 27 ff. and 47 ff. GC IV are now seen to be a codification of the rights and duties of the occupying power. The HagueReg, however, continue to be effective as international treaty law among the parties to HC IV, and, as pointed out in Para. I above, in the form of customary law.

The law of belligerent occupation regulates the relationship between the occupying power on the one hand, and the wholly or partially occupied state or the inhabitants of the occupied territory (including refugees and stateless persons) on the other. Not included in the category of protected persons are nationals of the occupying power (excluding refugees), nationals of states not bound by GC IV, and nationals of a neutral state or a co-belligerent state, to the extent that their interests can be protected by diplomatic representatives accredited by the occupying power.

For foreigners not covered by international humanitarian law, the normal law applicable to foreigners within the power of another state remains valid. The state may, if necessary, take steps to protect its nationals. under the heading General protection of populations against certain consequences of war, GC IV contains a number of provisions relating to the protection of all inhabitants (Arts. 13-26). They also apply, in particular, to foreigners who are not nationals of the occupied state and are present in the occupied territory. Finally, Article 75 API makes it obligatory for the occupying power to maintain a certain minimum standard of human rights which must be respected under all circumstances, i.e. also with respect to those categories of persons not covered by the protection of GC IV. Thus, all persons are entitled to humane treatment and may be restricted in

their freedom only by the decision of a court after a regular judicial procedure.

The law of belligerent occupation is applicable only in international armed conflicts. In a non-international conflict, the conquest by the government forces of territory held by the rebels does not constitute "occupation" but the reestablishment of control which has been lost by government. Such forces are bound by the domestic legal order, if necessary taking into consideration international obligations, especially those concerning human rights. The rebels, on the other hand, must always abide by the provisions of common Article 3 of the GCs and AP II.

Belligerent occupation is a form of foreign domination. Its effects on the population are mitigated by the provisions of international law on belligerent occupation. Hence, GC IV appears as a bill of rights with a catalogue of fundamental rights which, immediately upon occupation and without any further actions on the part of those affected, becomes applicable to the occupied territories and limits the authority of the occupying power.

Review Questions

☻ Briefly describe the historical development of rules relating to belligerent occupation.

☻ Are there any legal basis in any of the IHL instruments for rules relating to belligerent occupation.?

☻ What does the law of belligerent occupation regulate? What happens to foreigners not covered by IHL?

☻ Explain the applicability of the law of belligerent occupation for

non-international armed conflict.

Chapter Six: Conduct of Hostilities

6.0 Introduction

In this chapter, we will generally discuss the IHL rules regulating how belligerents should conduct hostilities to diminish the evils of armed conflicts. These rules are generally referred to as the Hague Laws. We will discuss, in particular, how these rules provide protection for civilian population against the effects of hostilities, the precautionary measures that belligerents should take, distinguish between permissible attacks and prohibited attacks, distinguish between permissible means and methods of warfare and prohibited means and methods. We will also deal with the place of humanitarian assistance in IHL.

6.1 Distinction between Hague Laws and Geneva Laws

IHL is usually divided into two as Geneva Laws and Hague Laws. The Geneva Laws generally refer to the four Geneva Conventions and additional protocols thereto. The Geneva laws, as discussed under Chapters 2-5 deal with the protection of persons and property. They provide list of categories of protected persons and property and provide them protection against the effects of hostilities by requiring belligerents to respect and ensure in all circumstances the minimum standards set therein. On the other hand, the Hague Laws refer to laws that were adopted in The Hague, and those that generally are designed to regulate the conduct of hostilities, particularly regulating the means and methods of warfare. For example, treaties relating to the use of weapons are regarded as forming part of Hague Laws. However, it should be stressed that the Hague laws have the same objective, i.e. minimizing the evils of armed conflict. The Hague laws do so by laying down what are permissible and prohibited attacks, prohibiting or restricting the use of certain weapons /means of warfare, by prohibiting or restricting certain methods of warfare. In

addition, the two laws have merged in the Additional Protocol I to the Geneva Conventions.

6.2 The Protection of the Civilian Population against the Effects of Hostilities

As already discussed, the rules of IHL provide protection to civilian population against the effects of hostilities. The basic rule on this is provided under Article 48 of Additional Protocol I to the Geneva Conventions. It states that

> In order to ensure respect for and protection of civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

It also goes on to state,

> the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy. Thus for this purpose it is sufficient to disable the greatest possible number of men…

This article clearly states that civilians and civilian objects cannot be the target of military attacks, as it is not justified by military necessity/objectives. In other words, the belligerents should target only military objectives. Hence, it becomes necessary to define what a civilian population/object or military objectives is. Before we deal with this issue, it is necessary to know the scope of application of the protection under the Protocol I. According to Article 49 of the Protocol, the protection applies in (1) acts of violence/armed conflict in defence and offence, (2) in whatever territory including attacks on its own territory under the control of the enemy, (3) attacks from land, air, or sea affecting the civilian population on land. Thus, the protections apply in all armed conflict.

6.3 Military Objectives

The law on the conduct of hostilities formerly focuse on the prohibition to attack undefended town and villages (see Article 25 of the Hague Regulations of 1907). This law has shifted, under Protocol I, to the rule that only military objectives may be attacked. Thus, it is necessary to define military objectives so that we will be able to distinguish between permissible attacks/acts and prohibited attacks/acts. The principle of distinction is particularly worthless without a definition of or at least one of the categories between which the attacker has to distinguish. It is claimed that there is no intrinsic character that makes an object a military object; rather, it is the use or potential use of an object that makes it military object, thus making its attack as an attack directed against military objectives. It is stated that every object other than those benefiting from special protection can become a military objective. The specially protected objects by Protocol I (Art. 56) and Convention IV (Art.19) like dams, dikes, and hospitals may not be used for military action by those who control them and should therefore never become military objectives. If they are, however, used for military purposes, even they can under restricted circumstances become military objectives. All these have prevented the formulation of an exhaustive list of military objectives.

Most of the definitions offered are abstract (see Art. 52(2)) but provide a list of examples. Protocol I chooses to exemplify its definition by an open list of examples of civilian objects which are presumed not to be military objectives (see Art.52 (3) of Protocol I). Under the definition, it is indeed only material objects that can be a military objective. Immaterial objectives are to be achieved, not attacked. It is the basic idea of IHL that a belligerent may achieve political objectives with military forces only by directing the latter against material military objectives.

Under the definition provided for by Article 52(2) of Protocol I, an object must fulfill two cumulative criteria to be a military objective. First, the object has to contribute effectively to the military action of one side second, its destruction, capture, or neutralization has to offer a definite military advantage for the other side. The fulfillment of the two criteria must be determined considering the circumstances ruling at the time. If the two criteria are met, there is a military necessity to attack the military objects.

6.4 Definition of civilian population

The principle of distinction can only be respected if not only the permissible objectives but also the persons who may be attacked are defined. As combatants are characterized by a certain uniformity, and civilians by their great variety, it is logical that Art. 50(1) of Protocol I

defines civilians by exclusion from the complementary category of combatants: Everyone who is not a combatant is a civilian benefiting from the protection provided for by the law on the conduct of hostilities.

6.5 Prohibited attacks

Methods of warfare are not unlimited under IHL. In particular, IHL prohibits certain kinds of attacks. The civilian population may never be attacked. This prohibition includes those attacks aimed at terrorizing the civilian population (see Arts. 48, 51(2) & 85(3) of Protocol I and Art.13 of Protocol II). IHL also proscribes attacks directed at civilian objects (see Arts. 52-56 & 85(3) of Protocol I). Even those attacks directed at a legitimate military objective are regulated by IHL Such attacks must not be indiscriminate, thus, the weapons utilized must be capable of being directed at the specific military objective and the means used must be in proportion to the military necessity (see Art.22 of the Hague Regulations and Art. 51 (4) & (5) of Protocol I). In addition, if not only military objectives but also civilians or civilian objects may be affected by the attack, precautionary measures must be taken (see Arts. 26 & 27 of the Hague Regulations, Art. 19 of Geneva Convention IV, and Art. 57(2) of Protocol I). Reprisals against civilians or civilian objects are also prohibited under IHL (see Arts. 51(6), 52 (1), 53(c), 54(4), 55(2) & 56(4) of Protocol I). IHL also prohibits abuse of this prohibition. In other words civilians and the civilian population and civilian objects may not be used to shield a military objective from attack (see Art. 28 of Convention IV & Art. 51(7) of Protocol I). Military objectives do not cease to be legitimate objects of attack merely because of the presence of civilians or protected objects. Nevertheless, care must be taken to spare the civilian population and objects when attacking a legitimate objective (see Arts. 51(8) and 57 of Protocol I).

It is also important to briefly consider protected objects, i.e., objects that cannot be the object of military attack. In order to further safeguard the civilian population, IHL protects specific objects from attack. IHL prohibits attack on civilian object, which are all objects not falling under the definition of military objectives (see Arts. 25 & 27 of The Hague Regulations, and Arts. 48, 52, & 85(3) of Protocol I). Thus, a civilian object is one not contributing to military action because of, e.g., its location or function and because its destruction would provide no military advantage. In addition, IHL grants other objects special protection. These include cultural objects (art□), and objects indispensable for the survival of the civilian population, such

as water (art□). Means and methods of warfare with the potential to cause widespread, long-term, and severe damage to the environment are prohibited (art□.). Works and installations containing dangerous forces (e.g. dams, dikes, and nuclear electrical power generating stations) are also considered specially protected objects and may not be attacked even if they constitute military objectives (see art□.). Attack of a military objective in the near vicinity of such installations is also prohibited when it would cause damage sufficient to endanger the civilian population (see art□□). The special protection of these works and installations ceases only under restricted circumstances (see art.56 (2) of Protocol I). Medical equipment (including transport used for medical purposes) is a final group of specially protected objects against which attack is prohibited (see Arts. 19(1) & 36(1) of Convention I, Arts. 22, 24-27, & 39 (1) of Convention II, Arts.18-19 &21-22 of Convention IV, Arts. 20 & 21-31 of Protocol I and Art.11 of Protocol II).

6.6 Means and Methods of Warfare

In this section, we will discuss the means and methods of warfare acceptable under IHL. Normally, these are matters to be decided by the parties. However, the parties to a conflict are not at liberty to adopt any means and method; in other words, IHL puts limits on belligerents that it prohibits certain means and methods. The rules of IHL provide that "the right of the Parties to the conflict to choose methods or means of warfare is not unlimited (Article 35 of Additional Protocol I). This section, therefore, discusses the prohibited or restricted use of weapons and prohibited methods of warfare.

IHL prohibits weapons that cause superfluous injuries or unnecessary suffering. There are several agreements within the international law that prohibit or limit the use of certain weapons for that reason.

The use, production, stock-piling, and transfer of anti-personal landmines are prohibited according to the Ottawa Treaty of 1997.The 1980 Convention on Certain Conventional Weapons (CCW) includes five protocols covering landmines, incendiary weapons (weapons that set fire to objects or cause burn injuries to persons), blinding laser weapons, and explosive remnants (weapons and ammunition left behind after war), undetectable fragments (weapons with the effect to injure by fragments that are non-detectable by x-ray). These treaties are binding on states that have signed and ratified them.

The 1925 Geneva Protocol prohibits the use of biological and chemical weapons. The Protocol is considered a customary international law

and is, therefore, binding on all states regardless of whether they signed it or not.

In 1972 and 1993, conventions were adopted to prohibit the use as well as the production, transfer, and stockpiling of biological and chemical weapons. These treaties are binding on states that have signed and ratified them.

Generally, the prohibited means of warfare include various kinds of weapons of indiscriminate character and / or those that cause unnecessary suffering. This includes in particular;

a) Bullets that expand or flatten easily in the human body;

b) Projectiles used with the only purpose to spread asphyxiating or poisonous gases;

c) Projectiles weighing less than 400 grams, which are either explosive or charged with fulminating or inflammable substances;

d) Poisons or poisoned weapons;

e) Asphyxiating, poisonous or other similar gases and bacteriological means; bacteriological (biological) and toxin weapons.,

g) Environmental modification techniques having widespread long-term or serious effects as means of destruction, damage or injury;

h) Certain conventional weapons of the indiscriminate character and weapons that may cause excessive injury or suffering. (See the June 17, 1925 Protocol for the prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological methods of Warfare; the April 10, 1972 Convention on the Prohibition of the Development. Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; the May 18, 1977 Convention on the Prohibition of Military and Other Hostile Use of Environmental Modification Techniques; the April 10, 1981 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects; and Protocols additional to it: the Protocol on Non-Detectable Fragments)

The right of the parties to a conflict to choose methods of warfare is, again, not unlimited (Article 35 of Additional Protocol I). The Methods of warfare prohibited under IHL (conventions/treaties or customary international law) include the following:

a) Treacherous killing or injuring members of the armed forces of the adversary;

b) Torture aimed at receiving information of any kind;

c) Misuse of distinctive national and international emblems, signals, flags;

d) The killing of a truce envoy and of persons accompanying him (trumpeter, bugler, drummer);

e) Perfidy;

f) Allowing a town or an area to be looted.,

g) Attacking, bombing or destroying medical facilities, hospital ships (medical transports), medical aircraft which have appropriate distinctive signs, medical personnel;

h) Killing or injuring persons of the adverse party who laid down arms or surrendered, having no means of defence;

i) Attacking persons hors de combat and persons who parachuted from an aircraft in distress (with the exception of paratroopers);

j) Destruction or seizure of the enemy's property, unless such actions are required by military necessity;

k) Capture of coastal fishing, vessels or vessels used for local navigation hospital ships and ships that have research and religious missions:

l) Genocide and apartheid;

m) Bombing of unprotected cities, ports, villages, dwellings, historical monuments, churches, hospitals by military aircraft or sea vessels, provided these sites are not used for military purposes;

n) Terrorizing local population;

o) Giving order that there shall be no survivors to threaten an adversary therewith, or to conduct hostilities on this basis'.

p) Forcing persons of the adverse party to take part in hostilities against their country;

q) Use of starvation among civilian population;

r) Destruction of cultural property, historical monuments, places of worship, etc., which constitute cultural or spiritual heritage of people, as well as their use in support of military effort. (See Art. 3 of the First, Second and Third Geneva Conventions; Art. 35, 53, 75. 85 of Additional Protocol I).

Summary

We have seen that the conduct of hostilities is regulated by the rules of IHL. By regulating the conduct of hostilities, both the Hague laws and the Geneva laws are meant to achieve the same objective, i.e., minimizing the evils of armed conflict (war). The Geneva laws try to protect civilians by allowing military attacks only against military objectives (object). This in itself is a regulation of the conduct of hostilities. As such, IHL makes a distinction between civilian population & civilian objects and military objectives. The rules of IHL also specifically prohibit certain types of attacks.

The means and methods of warfare are regulated by what are generally referred to as the Hague laws. Generally, it is up to the parties to choose means and methods of warfare that can advance their military objectives. However, the parties to a conflict are not at liberty to adopt any means and method; in other words, IHL puts limits on belligerents by prohibiting/ restricting certain means and methods of warfare. IHL prohibits or limits the use of certain weapons that cause superfluous injuries or unnecessary suffering. The rights of the parties

to choose methods of warfare are again not unlimited. The rules of IHL prohibit methods of warfare that cause unnecessary suffering and not justified by military necessity.

Finally, it is important to keep in mind that the rules regulating the conduct of hostilities do not emanate from treaties only. Customary rules of international law, general principles of IHL, and the Martens Clause may all be relevant in the determination of whether a belligerent is conducting hostilities according to the law.

Review Questions

1. What is the basic distinction between the Geneva laws and the Hague laws? Is it appropriate to categorize IHL treaties as such?
2. Who is a civilian? What is a civilian object?
3. What do you understand by military objectives?
4. How do you distinguish between permissible attacks and prohibited attacks? Give examples of prohibited attacks.
5. What is collateral damage?
6. Identify prohibited means of warfare. Discuss the justification in each case.
7. Identify prohibited methods of warfare? Discuss the justification in each case.

8. What would be the consequence if a military attack is conducted on civilians or civilian objects?

9. What would be the consequence if a belligerent resorts to prohibited means or methods of warfare?

10. Is Ethiopia a party to treaties (conventions) on prohibited or restricted means of warfare? If yes, identify them. If no, what would you advise regarding whether or not the country should ratify them?

CHAPETER SEVEN: The Law of Non-International Armed Conflict

7.0 Introduction

In this chapter, we will basically deal with the rules of IHL applicable to situations of non-international armed conflict, and the standards, if any, to characterize conflicts as such. The scope and number of IHL treaty rules governing non-international armed conflicts are far less extensive than those applicable to international armed conflicts. Internal armed conflicts are covered by Article 3 common to the Geneva Conventions, by Additional Protocol II to the Conventions adopted in 1977, and by a certain number of other treaties (e.g. the 1980 convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects and its protocols; the 1954

Hague Convention for the protection of cultural property in the event of armed conflict). Over a period of time it has become clear that, as a result of state and international practice, many rules applicable in international armed conflicts have also become applicable in internal armed conflicts as customary international law. The treaty rules, rules of customary international humanitarian law as well as others forming part of non-international armed conflicts will be discussed. Finally, we will consider the parties bound by these rules, and the nature of their obligation.

7.1 Distinction between International and Non-international Armed Conflicts, and Applicable Laws

Generally, the rules of IHL provide protections to victims of armed conflicts. However, the Geneva Conventions provide detailed rules for international armed conflicts while spelling out very limited rules for non-international armed conflicts. Thus, it has created two separate legal regimes applicable in different types of conflicts. We have the law of international armed conflict and the law of non-international armed conflict. In determining which regime of law is applicable to a certain conflict, it becomes crucial, first, to ascertain whether the conflict is international or non-international. There is also an evolving third type of conflict called internationalized armed conflicts.

International armed conflicts are conflicts between states. They are inter-state armed conflicts. Non-international armed conflicts are generally armed conflicts taking place within the boundaries of one country between the government forces and non-government armed groups (rebels) or among rebels themselves. There is no other States participation in the conflict. Thus, they are sometimes referred to as internal armed conflicts. The notion of internationalized armed conflicts is not clear but it is understood, in one sense, as armed conflicts sharing the feature of both international and non-international armed conflicts. It is also understood as conflicts originally non-international (internal) in nature but that have taken a different form because of the involvement of other States in support of any of the groups fighting (e.g. the conflicts in the Balkans). James G. Stewart states the term internationalized armed conflict includes war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting an established government. Determining the applicable law to such internationalized armed conflict is relatively difficult. However,

characterizing a conflict is necessary to determine the regime of IHL applicable to it.

From a humanitarian point of view, the same rules should protect victims of international and non-international armed conflicts. Similar problems arise and the victims need similar protection. However, two separate legal regimes of IHL exist providing varying scope of protections and obliging humanitarian actors and victims to qualify the conflict before they can invoke the applicable protective rules. Such qualification is sometimes theoretically difficult and always politically delicate. Sometimes, to qualify a conflict implies a judgment is made upon questions of jus ad bellum. For instance, in a war of secession, for a humanitarian actor to invoke the law of non-international armed conflict implies that the secession is not (yet) successful, which is not acceptable for the secessionist authorities fighting for independence. On the other hand, to invoke the law of international armed conflicts implies that the secessionists are a separate State, which is not acceptable for the central authorities.

On the one hand, the protections of victims of international armed conflicts must necessarily be guaranteed through the rules of international law. States have long accepted such rules of international armed conflict. States have for a long time accepted that soldiers killing enemy soldiers on the battlefield may not be punished for their mere participation. In other words, that they have a □right to participate□ in hostilities.. On the other hand, the law of non-international armed conflicts is more recent. States have for a long time considered such conflicts as their internal affairs governed by their domestic laws and no State is ready to accept that its citizens would wage a war against their own government. In other words, no government would in advance renounce to punish its own citizens for their participation in the rebellion. Such renunciation, however, is the essence of the combatant status as prescribed by the law of international armed conflicts. To apply all rules of contemporary IHL of international armed conflicts to non-international armed conflicts would be incompatible with the very concept of the contemporary international community composed of sovereign States. Thus, currently we have two separate branches of IHL to be studied, interpreted and applied based on the nature of the conflict.

7.2 The Rules Applicable to Non-International Armed Conflicts

Today, non-international armed conflicts occur much more frequently and entail more suffering than international armed conflicts. Thus, it becomes necessary to understand and apply the protective rules of IHL in situations of non-internal armed conflicts. In this section, we

will briefly discuss the laws applicable to non-international armed conflicts. In other words, we will discuss the laws that regulate non-international armed conflicts. These laws, generally, include Common article 3 & Protocol II, rules of customary international law, general principles of IHL, and finally rules of international armed analogically applicable to non-international armed conflicts.

7.3 Rules of Common Article 3 and Additional Protocol II

When the 1949 Geneva Conventions were drafted and adopted, it was possible to spell out in considerable detailed rules regarding the care of the wounded, sick and shipwrecked, the treatment of prisoners of war, and even the protection of civilians in occupied territories. But these detailed rules were only applicable in wars between States, sometimes referred to as international armed conflicts. Only one article has been agreed upon regarding non-international armed conflicts. This article contains identical provisions and incorporated in all four Geneva Conventions as Article 3, and hence called common Article 3.

Common Article 3 sets out a number of important protections that all parties to a conflict respect, and applies to any armed conflict not of international character. It is now considered to be part of a customary international law. The minimum protection provided is stated broadly as humane and non-discriminatory treatment, in all circumstances, of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed horse de combat y sickness, wounds, detention or any other cause. It prohibits any adverse distinction founded on any ground/criteria stated therein. It also provides for protection of the above listed persons against certain treatment by specifically prohibiting certain acts. These prohibited acts are; (1) violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (2) taking of hostages; (3) outrages upon personal dignity, in particular humiliating and degrading treatment; (4) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Common Article 3 also calls for the collection and care of the wounded and the sick. Thus, the parties to a conflict are duty bound to respect and apply these minimum protections. It also calls for the parties to a conflict to endeavor to bring into force, by means of special agreements, all or part of the other provisions of the Geneva Conventions. In addition, it allows an impartial humanitarian body, such as the ICRC, to offer its services to the parties to the conflict.

However, common Article 3 has two shortcomings. First, it provides only a minimum of protection. For example, it is silent on issues relating to freedom of mo movement, does not explicitly prohibit rape, and does not explicitly address matters relating to the methods and means of warfare. Second, while common Article 3 does not define armed conflicts not of international character, in practice this wording has left room for governments to contest its applicability to situations of internal violence inside their countries. These and other criticisms led to efforts to improve the rules of IHL. The most significant of these efforts grew out of a resolution adopted at the international conference on human rights, held in Tehran in 1968. Resolution XXIII specifically requested the General Assembly to invite the Secretary General to study, inter alia:

> The need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts.

This request was based on the consideration that the 1949 Geneva Conventions were not sufficiently broad in scope to cover all armed conflicts. The subsequent studies conducted by the Secretary-General, in consultation with ICRC, recommended that, among other things, efforts be undertaken to considerably expand the scope of protection in internal armed conflicts. As a result, a draft convention was prepared and was finally adopted as Additional Protocol II to the Geneva Conventions.

Protocol II sets out numerous important guarantees for the protection of those affected by non-international armed conflicts. It expands the protection offered by common Article 3 to include prohibitions on collective punishments, violence to health and physical and mental well-being, acts of terrorism, rape, enforced prostitution and indecent assault, slavery and pillage. In addition, it includes provisions for the protection of children, for the protection and rights of those detained for reasons related to the conflict, and provides fair trial guarantees for those prosecuted for criminal offences related to the conflict. There are also articles dealing with the protection and care of the wounded, sick and shipwrecked and the protection of medical and religious personnel. Protocol II also prohibits attacks on the civilian population, the use of starvation as a method of war, and the arbitrary displacement of the civilian population.

The protections offered by Protocol II are a considerable improvement on common Article 3. However, measured against the rules for inter-state wars/international armed conflicts/, they are still quite basic.

The most serious omissions concern the many specific protections for civilians against the effects of hostilities found in Protocol I. For example, Protocol I prohibits direct and indiscriminate attacks on civilians, including providing examples of specific types of prohibited indiscriminate attacks; it places fairly detailed obligations on armed forces regarding precautions to be taken to ensure protection of the civilian population and civilian objects; and it establishes rules regarding non defended localities and demilitarized zones. Protocol II provides only a few general rules on these matters.

However, the bigger difficulty with Protocol II is that the protection it offers only apply in internal conflicts meeting a certain threshold of intensity and nature. Under Article 1(1), the Protocol 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.

And Article 1(2) specifically excludes from the scope of the Protocol:

> situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

It is argued that this two-fold test would appear to limit the application of Protocol II to situations at or near the level of a full-scale civil war, and it is contended that few governments are prepared to admit the application of the Protocol to situations of lesser intensity. Since neither the Protocol nor any other agreement allows for an impartial outside body to decide on whether or not the criteria are met to apply the Protocol, it is largely left to the goodwill of the government concerned. This goodwill is often lacking-admitting the application of the Protocol is seen as conferring international legitimacy on the opposition forces, and/or an implicit admission on the government s part of its of effective control in the country.

The result is that there are many situations of internal violence including those leading to thousands of deaths-where there are no clear treaty rules in place to regulate important aspects of the behavior of armed forces and armed groups involved. What do you think is the solution? How can you determine whether the thresholds under Article 1 (1&2) are met or not?

7.4 Customary International Humanitarian Law

In addition to the treaty rules, internal armed conflicts are still regulated by the rules of customary international law. As far back as 1907, States have seen fit when drafting international agreements concerning the law of war to explicitly indicate that in situations not covered by treaty rules, both combatants and civilians:

> remain under the protection and the rule of the principle of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.

This clause, known as Martens clause, is also found in the preamble to Protocol II:

> Recalling that, in cases not covered by the laws in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.

Like common Article 3, Martens clause provides important protections. It shows a concrete recognition and acceptance by States that rules of customary international law above and beyond existing treaty rules can apply to fighting inside countries. To date, the problem has been in determining, both in general and as regards any specific case, what is prohibited by the principles of humanity and the dictates of the public conscience. Does this mean, for example, that weapons the use of which is prohibited in international conflicts cannot generally be used in internal conflicts? Does it mean the prohibitions on arbitrary displacement and on the use of starvation as a method of war apply at all times, and not in internal conflicts meeting the high threshold of protocol II? Or does it also mean that indiscriminate attacks are prohibited at all times and not just in international conflicts?

7.5 General Principles of International Humanitarian Law

In addition to the treaty rules and rules of customary international humanitarian law, the general principles on the conduct of hostilities may also be applicable to internal armed conflict. A number of cases demonstrate the applicability of these principles, and as we infer from Article 38 of the Statute of the ICJ one source of international law is judicial decisions. These general principles applicable to internal armed conflict include the principle of distinction, the principle of military necessity, the principle of proportionality, and the right to relief (humanitarian assistance).

7.6 Analogical Application of the Law of International Armed Conflict

The law of international armed conflict may also analogically apply to regulate internal armed conflicts. There is a necessity of analogy of law of internal armed conflict with the law of international armed conflicts. First, there are cases where the precise rule resulting from a common principle or from a combination of principles with a provision of the law of non-international armed conflicts or with simple legal logic can be found by analogy from the rules which have been laid down in the much more detailed rules of the conventions and Protocol I for international armed conflicts. Second, certain rules and regimes of the law of international armed conflicts have to be applied in non-international armed conflicts to fill gaps in the provisions applicable to it, to make the application of its explicit provisions possible, or to give them a chance to be applied in reality. The law of non-international armed conflicts contains no definition of military objectives nor of civilian population. Such a definition is, however, necessary to apply the principle of distinction applicable in both fields and the explicit prohibitions to attack the civilian population, individual civilians, and certain civilian objects. Thus, the definition found in the law of international armed conflicts shall apply to non-international armed conflicts.

A striking feature of the law of non-international armed conflicts is that it foresees no combatant status, does not define combatants and does not prescribe specific obligations for them; its provisions do not even use the term combatant. This is a consequence of the fact that no one has the right to participate in hostilities in a non-international armed conflicts (a right which is an essential feature of the combatant status) and is in line with the fact that the law of non-international armed conflicts does not protect according to the status of a person but according to his or her actual activities. Nevertheless, if civilians are to be respected in non-international armed conflicts, as prescribed by the applicable provisions of International Humanitarian Law, it must be possible for those conducting military operations to distinguish between those who fight from those who do not fight, and this is only possible if those who do fight distinguish themselves from those who do not fight. The detailed rules found in the law of international armed conflicts in this regard can be applicable to solve the problems in the law of non-international armed conflicts.

A more difficult case concerns the prohibitions or limitations on the use of certain weapons. None of the relevant differences between the two categories of conflicts could justify not to apply in non-international armed conflicts prohibitions or restrictions on the use of

certain weapons contained in the law of international armed conflicts. In addition, the rules on the use of emblem shall also analogically apply to non-international armed conflicts. Generally, it becomes necessary to analogically apply certain rules of the law of international armed conflicts to situations of non-international armed conflict for reasons stated above. But such analogy must be approached carefully as there are limitations to it.

7.7 Parties Bound by the Law of Non-international Armed Conflicts

From the point of view of the law of treaties, Article 3 common to the four Geneva Conventions and Protocol II bind the States party to those treaties. Even those rules of IHL of non-international armed conflicts customary international law would normally bind only States. This obligation of States includes a responsibility for all those who can be considered as agents of those states. IHL must, however, also bind non-state parties in a non-international armed conflict. This includes not only those who fight against the government but also armed groups fighting each other. This is necessary not only because victims must equally be protected from rebel forces but also because, if IHL did not respect the principles of equality of belligerents before it in non-international armed conflicts, it would have an even smaller chance of being respected by either the governmental forces because they would not benefit from any protection under it, or by the opposing forces because they could claim not to be bound by it.

There fore one has, first, to first consider that when creating through agreement or custom the rules applicable to non-international armed conflicts, including the provision under common Article 3 that these rules be respected by each Party to the conflict, States implicitly confer on non-governmental forces involved in such conflicts the international legal personality necessary to have rights and obligations under these rules. According to this construction, the States have conferred to rebels through the law of non-international armed conflicts-the status of subjects of IHL. Otherwise, their legislative efforts would not have had the desired effect, the effet utile. At the same time, States explicitly excluded that the application and applicability of IHL by and to rebels would confer the latter a legal status under the rules of international law other than those of IHL (see Article 3 (4) common to the Geneva Conventions).

Second, IHL of non-international armed conflicts binds not only the States but also the non-governmental parties to such a conflict through national legislation. Once the State is bound by IHL, these rules either become part of its internal law or must be put into effect

through implementing legislation. This internal law then applies to every one on the territory of the State. Under this construction, IHL directly obliges the rebels Only if they become effective government, they would be directly bound by these international rules.

While the law of non-international armed conflicts binds both States party and non-State armed groups, there are difficulties on the legal mechanisms for its implementation, particularly on the part of non-state armed groups. There are questions on how rebel groups respect and enforce the rules of IHL and their responsibility, if violations occur.

Summary

In this chapter we basically dealt with the distinction between international and non-international armed conflict, and the rules applicable to non-international armed conflict and the parties bound thereto.

We have seen the rules of IHL developed primarily to regulate international armed conflict. States were not much concerned about non-international armed conflict. However, the increase in the number of non-international armed conflicts after WWII particularly liberation movements against colonialism have led the international community to regulate non-international armed conflict. As a result, despite some arguments to the contrary, we have two separate legal regimes of IHL applicable in two different situations. Thus, characterizing a conflict is becoming a prerequisite for the determination of the applicable law.

As already seen, the scope and number of IHL treaty rules governing non-international armed conflicts are far less extensive than those applicable to international armed conflicts. The treaty rules that are often referred to are those found under Article 3 common to the Geneva Conventions, Additional Protocol II to the Geneva Conventions

adopted in 1977. You should also keep in mind that certain provisions of other treaties are relevant.

Finally, we have discussed that the laws applicable to non-international armed conflicts are not restricted to treaty rules. In other words, the laws of non-international armed conflict also include customary rules of IHL, general principles of IHL, and finally rules of international armed analogically applicable to non-international armed conflicts.

Review Questions

1. What is the distinction between international, internationalized, and non-international armed conflict? Has there been such a conflict to which Ethiopia was a party to in recent years?
2. Identify and explain the rules applicable to non-international armed conflict
3. What is the threshold for the application of Additional Protocol II? How do you evaluate it in comparison with Article 3 common to the Geneva Conventions?
4. Which law should regulate internationalized armed conflict?
5. It is argued that victims of armed conflict face similar problems and deserve similar protection irrespective of the nature of the conflict. Do you agree with this opinion? Why/why not?

6. Do you think that currently IHL provide the same protection to victims irrespective of the type of the conflict? If no, what accounts for the difference?

7. Do rebel groups have international legal personality? Do rebel groups have an obligation under IHL? If yes, what is the justification?

8. What would be the legal consequence if any of the parties to non-international armed conflict violate IHL? Can the other party be exempted from the duty to observe the rules?

9. Is there a prisoner of war status under the laws of non-international armed conflict? Why/why not?

10. Do you think the analogical application of rules of international armed conflict to non-international armed conflict is appropriate?

CHAPTER EIGHT: Implementation of International Humanitarian Law

8.0 Introduction

This chapter introduces students to the different mechanisms of implementation of IHL together with the difficulties. We will discuss the measures to be taken by belligerents, and the role of other actors in assisting or supervising implementation. We will also consider the consequences of violations of IHL.

8.1 General Problems of Implementation of International law

The general mechanisms foreseen by international law to ensure its respect and to sanction its violations are even less satisfactory and efficient regarding IHL. In armed conflicts, they are inherently

insufficient and some of them even counter-productive. The traditional way to implement the law of international society made up of sovereign States is typical for decentralized society and gives the potential or actual State victim of a violation the injured State-an essential role. The injured State may be supported by other States, according to their interests, which should include the general interest of every member of that society to have its legal system respected. This decentralized structure of implementation is particularly inappropriate for IHL applicable in armed conflicts for the following reasons.

First, the peaceful settlement of disputes arising out of violations of IHL would, at least in international armed conflicts, be astonishing. In deed, IHL applies between two States because they are engaged in armed conflicts, which proves that they are unable to settle their disputes peacefully.

Second, in international armed conflicts, the injured State has the most unfriendly relation with the State violator: armed conflict. Consequently, the numerous ways of preventive and reactive influence, which make international law normally to be respected, are lacking for the injured State. In traditional international law, the use of force was the more extreme reaction by the injured State. Today, it is basically outlawed except in reaction to a prohibited use of force. In addition, for a State injured by a violation of IHL, the use of force is logically no longer possible as a reaction to a violation of IHL because such a violation can occur only in an armed conflict, namely, where the two States are already using force. The only reaction that would remain at the disposal of the injured State in the traditional structure of law enforcement in the international society would be an additional use of force consisting of a violation of IHL itself. While such reciprocity or fear of such reprisals may contribute to the respect of IHL, they have been largely outlawed because they lead to a vicious circle, a "competition of barbarism," and hurt the innocent, precisely those whom IHL wants to protect.

Third, confronted with an armed conflict between two States, third States may have two reactions. They may take sides for reasons which are either purely political or, if connected to international law, derive from the jus ad bellum. They will, therefore, help the victim of aggression, independently of who violates the jus in bello. Other third States may choose not to take sides. As neutrals, they can contribute to make IHL respected, but they will always be cautious that their engagement for the respect of IHL will not affect their basic choice not to take sides.

This traditional and decentralized method of implementing international law is today supplemented and tends to be partially superseded by the more centralized enforcement mechanisms foreseen by the UN Charter. The UN enforcement mechanisms are criticized as frail and politicized but come close to what one could wish as a law enforcement system of the international community. Apart from the fact that this system is till weak, dominated more by the real power structures than by the rule of law and that it frequently applies double standards, this system is inherently not very appropriate for the implementation of IHL. One of its supreme goals is to maintain or restore peace, that is, to stop armed conflicts. The UN has, therefore, an obligation to privilege the respect of jus ad bellum over the respect of *jus in bello*. Furthermore, the most extreme enforcement measure of the UN system, namely the use of force, is itself an armed conflict to which IHL must apply. The other strong measure under the UN Charter economic sanctions as a mechanism of ensuring the respect of IHL is also problematic as economic sanctions inevitably provoke indiscriminate human suffering.

Because of these shortcomings of the general mechanisms of enforcement, IHL had to provide specific mechanisms of its own and adapt general mechanisms to the specific needs of victims of armed conflicts. It had to also overcome one of the axioms of the traditional international society and foresee enforcement measures directed not only against the State responsible for violations but also against the individuals violating it. It also had to ensure that its rules are known and integrated into national legislation so that it can take advantage of the relatively much more efficient and organized national law enforcement systems. It also recognized a particular role to an external independent and impartial body, the ICRC. IHL adopts the traditional mechanism of good offices through the incorporation of the Protecting Power system. Finally, it clarifies that the obligations provided for by IHL are obligations *erga omnes* by obliging every State Party to ensure its respect by other States party. We should, however, keep in mind that these specific mechanisms established by IHL remain embedded in the general mechanism. IHL is certainly not a self-contained system. Parallel to the specific mechanisms, the general mechanisms remain available and applicable whenever appropriate. In the next section we will discuss the available mechanisms of implementing IHL.

8.2 Measures to be taken in peacetime

The military and economic aspects of a possible armed conflict are prepared in advance in peacetime. Similarly, the humanitarian aspect in particular the respect of IHL shall be prepared in peacetime. If

soldiers are not properly instructed in peacetime, i.e., not only by informing them of and explaining the rules but also by integrating into the normal training and maneuvers to create automatic reflex actions, the rules of IHL will not be respected in case of armed conflict. Similarly, the whole population must have a basic understanding of IHL in order to realize even in armed conflict, certain rules apply irrespective who is right and who is wrong, protecting even the worst enemy. Once an armed conflict with all the hate has broken out, it is often too late to learn this message. Thus, States have an obligation to disseminate IHL under the Geneva Conventions and additional protocols (Arts. 47, 48, 127 & 144 of the Conventions respectively, and Arts. 83 and 87(2) of Protocol I & Art. 19 of Protocol II). Therefore, soldiers, police officers, civil servants, politicians, diplomats, lawyers, journalists, students who will fulfill these tasks in the future, and the public at large who generates public opinion must know the limits to which everyone s actions are submitted in armed conflicts, the rights everyone may claim in armed conflicts, and how international and national news about armed conflicts have to be written, read, and treated from a humanitarian perspective.

The measures to be taken in peacetime also include the translation of the instruments of IHL into national languages. Furthermore, if international treaties have to be transformed by national legislation into the law of the land for their applicability, such legislation should be adopted, in peacetime, as soon as the State has become a party to the relevant instrument. Legislation sanctioning violations should also be adopted. Finally, certain practical measures must be taken by States for them to be able to respect IHL. Qualified personnel and legal advisors have to be trained in peacetime so as to be operational in wartime (see Arts. 6 82 of Protocol I). Combatants and certain other persons need identity cards or tags to be identifiable (see Arts. 16, 17 (1), 27, 40 & 41 of Convention I; Arts. 19, 20, & 42 of Convention II; Arts. 4(A) (4) & 17 (3) of Convention III; Arts. 20(3) & 24 (3) of Convention IV and Arts. 18 & 79 (3) of Protocol I. Military objectives have to be separated as far as possible, from protected objects and persons (see Art. 19(2) of Convention I, Art.18 (5) of Convention IV, and Arts. 12 (4), 56(5) & 58 (a & b) of Protocol I).

8.3 Respect by the Parties to the Conflict

IHL obliges parties to a conflict to respect its rules. Under Article 1 common to the Geneva Conventions and Protocol I, States undertake to respect the rules therein in all circumstances. Thus, they are bound by what they have agreed on. This is the principle of *pacta sunt servanda*. We have already seen the reasons why non-government armed groups in non-international armed conflicts have this obligation

in the previous chapter. Thus, parties engaged in an armed conflict have the duty to respect the rules of IHL. In other words they should refrain from committing acts prohibited and perform acts/measures prescribed by the rules of IHL. They should supervise the conduct of their agents to make sure that they are in line with the requirements of IHL. They should also conduct inquiries when there are allegations of misconduct and apply appropriate sanctions. They should provide complaint-handling mechanisms. They are also obliged to appoint protecting powers that will work for the respect of IHL by the parties to the conflict (see Arts. 8, 8, 8 & 9 of the Conventions respectively; and Art. 5 of Protocol I).

8.4 The Obligation to Ensure Respect

Under Article 1 common to the Conventions and Protocol I, States also undertake to ensure respect for IHL. The International Court of Justice (ICJ) has, in the Nicaragua v US case, recognized this principle to belong to a customary international law and to also apply to the law of non-international armed conflicts. Under this principle, not only the State directly affected by a violation is concerned and may take measures to stop it, but also all other States not only may, but also must take measures. The obligations under IHL are, therefore, certainly obligations erga omnes. It is, however, controversial which measures each State thus entitled and obliged may take under the law of State responsibility. But common Art.1 endorses in legal terms the moral idea that ensuring a minimum of humanity to victims of armed conflicts is a common responsibility of all States and of all human beings.

8.5 Scrutiny by Protecting Powers and ICRC

During war (armed conflict), there is no diplomatic or other relation between the parties. There is no possibility of bilateral communications (talks) in the absence of a third party who offer their good office. Each of the parties to the conflict may accuse the other party of violating the rules of IHL. Thus, it is necessary to have a neutral State (s) to talk to each party to the conflict, and thereby supervise (or even assist them in) the implementation of IHL. Protecting powers are neutral States (States that are not parties to the conflict) that are chosen (appointed) by the parties of the conflict to oversee the implementation of IHL by both parties to the conflict.

As usually pointed out, IHL has taken advantage of the traditional institution of the law of diplomatic relations, specifying and

developing it for the purpose implementing its rules. IHL, thus, provides that its rules shall be applied with the co-operation and under the scrutiny of the Protecting Powers (see 8 common to Conventions I-III; Art. 9 of Convention IV; and Art.5 of Protocol I). Such protecting powers must be chosen from neutral States or other States not Pay to the conflict.

IHL makes the designation of protecting powers an obligation to parties to international armed conflicts (see Art.5 (1) of Protocol I). In practice the, main problem is, however, the designation of such powers. Basically, all three concerned States must agree the designation. According to the Conventions, if no protecting powers can be appointed, a detaining or an occupying power can ask a third State bilaterally to act as a substitute of a protecting power. If this does not work, the offer of a humanitarian organization such as the ICRC to act as a humanitarian substitute of a protecting power shall be accepted. Though such appointment procedures are elaborated, no protecting power can act efficiently without the consent of both belligerents.

The Geneva Conventions and Additional Protocol I incorporate many provisions on the tasks of the protecting powers. These tasks relate to the following fields: visit to protected persons, supervision of relief measures and evacuations, reception of applications by protected persons, assistance to judicial proceedings against protected persons, transmission of information, documents, and relief goods, the offering of good offices and others. Most of these tasks are also assumed by the ICRC with the effect that there will be increased supervision of the respect of IHL. Because of its mandate, the ICRC can fulfill most of the functions of protecting powers on its own without acting as a substitute of a protecting power when the latter s appointment is not successful. Generally the Geneva Conventions and the Protocol I provide supervision by protecting powers and the ICRC as one mechanism of ensuring the implementation of IHL by the parties to a conflict.

8.6 The Role of National Red Cross and Red Crescent Societies, and Non-governmental Organizations

National Societies can promote the implementation of IHL within their own countries. They may take a range of measures contributing to the implementation of IHL. These include discussing with national authorities the need for adherence to IHL rules, making national authorities aware of the need for IHL implementing legislation, drafting legislation and/or commenting on drafts to be adopted, promoting legislation to protect the emblem, monitoring the use of the

emblem, disseminating IHL on their own, reminding national authorities of their obligation to disseminate IHL, providing national authorities with advice and materials on dissemination, contributing to the training of advisers and personnel of armed forces, contributing to the care of the wounded and the sick by acting as auxiliaries to the military medical services (see Art. 26 of Convention I), and others. According to Article 27 of Convention I, national societies of neutral States also play a role in this field when they lend their assistance to a party to a conflict or when they serve under the auspices of the ICRC.

Non-governmental organizations also play a role in the implementation of IHL. They can do so by providing humanitarian assistance to victims of armed conflicts, monitoring, reporting and mobilizing public opinion, and through advocacy of IHL.

8.7 The United Nations and IHL

The primary objective of the UN is to prevent war (by restricting the use of force), & not to regulate the conduct of war. This makes international humanitarian law appear tangential (peripheral). As you have studies in the course on public international law , one purpose of the UN is to maintain international peace and security. The Security Council is particularly authorized to take appropriate measures when it determines that there is a breach or threat to international peace and security. In fulfilling its primary objective, the UN Charter permits, for instance the Security Council to authorize the use of force (Under Chapter VII), in which situations IHL applies. On the other hand, the UN has taken a number of steps to ensure the respect of IHL. The establishment of the ad hoc tribunals for the Former Yugoslavia and Rwanda demonstrates that the UN Security Council, in fact, regards violations of IHL as breaches of or threats to international peace and security.

Under the Charter, the main aim of the UN when confronting an armed conflict should be to stop it and to solve the underlying dispute. To do this, the UN has to take a side, for example against the aggressor, which seriously hampers its ability to contribute to the enforcement of IHL and at least theoretically, to provide humanitarian assistance, as the former has to be enforced independently of any consideration of *jus ad bellum,* and the latter has to be provided according to the needs of the victims and independently of the causes of the conflict.

Another role of the UN may be manifested through the work of its main judicial organ, i.e., the International Court of Justice (ICJ), which may interpret IHL when its advisory opinion is sought or when a case

is led to it. In deed, the ICJ has dealt with some contentious or advisory cases raising IHL issues (e.g. on the legality of the threat or use of nuclear weapons & on the legal consequences of the construction of a wall in the occupied Palestinian territory).

The UN Charter makes no mention of IHL. The purposes and principles of the UN are expressed in human rights terms (see Arts. 24 (2), 1 (3) & 55 (c)). Therefore, the UN traditionally refers to IHL as "human rights in armed conflict" (See UNGA Res. 2444 (XXIII) of 19 Dec. 1968). The Geneva Conventions like wise virtually fail to refer to the UN (except for very few provisions). Do you think that IHL is part of International Human Rights Law?

Conceptually, the UN cannot be considered as a "party" to a conflict nor a "Power" as understood by the Conventions. In practice, however, peacekeeping and peace-enforcement operations can involve, with or against the will of the UN, hostilities with the same characteristics and humanitarian problems to be solved by IHL as traditional armed conflicts. There are lots of issues regarding the applicability of IHL to such events. Does IHL apply to such situations and, if it does, what degree of intensity of the hostilities triggers the applicability of IHL? When does the law of international and of non-international armed conflicts apply? Who is bound the UN or the contributing states? The role & responsibility of humanitarian organizations like, the UNHCR, UNICEF & WHO, is sometimes problematic.

8.8 International Responsibility for Violations

Violations of IHL lead to state and individual responsibility. In the traditional structure of international law, only States are assumed to violate IHL and measures to stop and repress them, therefore, must be directed against the State responsible for the violations. Such measures can be seen in International Humanitarian Law (IHL) it self, in the general international law of State responsibility, or under the United Nations Charter as the "constitution" of organized international society.

Under its traditional structure, international law prescribes certain rules of behavior for States, and it is up to every State to decide upon practical measures or penal or administrative legislation to ensure that individuals under its jurisdiction comply with these rules in deeds in the ends only human beings can violate or respect rules. There is, however, a growing branch of international law which consists of rules of international law specifically criminalizing certain individual behavior and obliging States to criminally repress such behavior.

International Humanitarian Law is one of the first branches of international law, which contained such rules of international criminal law. The responsibility of individuals under international law was affirmed in the Nuremberg and Tokyo trials held after the end of WWII.

IHL obliges States to suppress *all its violations*. Certain violations, called war crimes, are criminalized by IHL. The concept of IHL war crimes includes but is not limited to the violations listed & defined in the conventions & Protocol I as grave breaches (See Arts. 50, 51, 130, & 147 respectively of the four Conventions and Arts.11(4),85&86ofProtocolI).

IHL requires States to enact legislation to punish such grave breaches, to search for persons who have allegedly committed such crimes, & to bring them before their own courts or to extradite them to another State for prosecution (see Arts. 49, 50, 129, & 146 respectively of the four Conventions and Art. 85 (1) of Protocol I). In addition to territory and nationality as a basis of criminal jurisdiction, IHL confers on all States universal jurisdiction over grave breaches.

The principle of universal jurisdiction is classically defined as a legal principle allowing or requiring a State to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim. This principle is said to derogate from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator or the victim. The rationale behind it is broader: it is based on the notion that certain crimes are so harmful to international interests that states are entitled-and even obliged to bring proceedings against the perpetrator, regardless of the crime and the nationality of the perpetrator or the victim. Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world. The Princeton Principles on Universal Jurisdiction provide list of crimes over which States can exercise universal jurisdiction. Principle 2 reads: (1) for purpose of these principles, serious crimes under international law include (i) piracy, (ii) slavery, (iii) war crimes, (iv), crimes against peace, (v) crimes against humanity, (vi) genocide, and

(vii) torture. Paragraph 2 provides the application of universal jurisdiction the crimes listed in Paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law. Generally, International law empowered and in certain cases mandated states to prosecute crimes that were regarded as harming the whole international community. Nevertheless, implementation of the general principle remained difficult and the principle is not applied uniformly everywhere.

Apart from national prosecutions, individuals were brought before international ad hoc courts. The first among these tribunals is the International Military Tribunal at Nuremberg established by the London Agreement of August 1945. The London Agreement has defined the jurisdiction of the tribunal. Many Nazi officials were prosecuted before this tribunal. The Tokyo tribunal was similar to the Nuremberg tribunal.

After the end of the Cold war, a number of ad hoc international tribunals were established by the Security Council pursuant to its authority under Chapter VII of the UN Charter. The International Criminal Tribunal for the former Yugoslavia & the International Criminal Tribunal for Rwanda (ICTY & ICTR respectively) are examples of such tribunals. The statutes establishing such tribunals set out the crimes that fall within the jurisdiction of each tribunal. These are ad hoc tribunal established to address certain crimes committed in certain geographic location or during specific period. However, we can understand that this is employed as a means of ending impunity.

Currently, we have a permanent international court called International Criminal Court (ICC) having jurisdiction over war crimes. The Court is established pursuant to the Rome Statute of the International Criminal Court, which was adopted at a diplomatic conference in Rome, on 17 July 1998. The Statute entered into force on 1 July 2002, and the Court is now fully functional at its seat in The Hague. According to Article 5 of the Rome Statue, the International

Criminal Court has jurisdiction over genocide, crimes against humanity, war crimes, and crimes of aggression. However, the Court operates a complement not as a substitute to national courts. Consequently, it can exercise jurisdiction only if a State is unable or unwilling to prosecute persons suspected of such violations.

A number of individuals are charged before the ICC including (1) Joseph Koni (leader of Lords Resistance Army (LRA) of Uganda) and some other members of the LRA, (2) Ahmed Harun, Humanitarian Affairs Minister of Sudan, (3) Thomas Lubanga, Union of Congolese Patriots, DRC, and (4) most recently the Sudanese President Omar Hassan Ahmad al-Bashir.

Today, despite some challenges in the implementation and arguments of unevenness, the international criminal responsibility of individuals for violation of IHL is beyond any doubt. Thus, prosecution before international tribunals (courts) is one mechanism for the implementation of IHL.

Summary

In this chapter we dealt with the different mechanisms of implementation of IHL. We have seen that the general mechanisms of implementation of international law are problematic. These mechanisms become more problematic when it comes to IHL. We, thus, discussed the specific mechanisms for the implementation of IHL with out rejecting the possibility of adapting the general mechanisms of implementation of international law to IHL.

We discussed that States have the duty not only to respect IHL but also to ensure the respect of IHL. States shall take a wide range of measures (activities) not only during armed conflict but also in peacetime. Certain measures required by IHL like the incorporation of IHL into national laws and the dissemination of IHL including training members of armed forces can be taken during peacetime. States have the duty to take any measures to suppress the violation of IHL, and in some cases have the duty to prosecute individuals who commit

violations. IHL also recognizes universal jurisdiction with respect to certain violations of its rules.

IHL also requires the integration of its rules into national legislation so that it can enforce through the national law enforcement system. The recognition of the role of the ICRC and national Red Cross or Red Crescent societies is an essential element in ensuring the implementation of IHL rules. The Protecting Power system is also another mechanism for the implementation of IHL. We have also discussed roles of the UN in the implementation of IHL.

We have also seen that IHL has devised an implementation mechanism by imposing responsibility not only against the State responsible for violations but also against individuals violating it. In this respect, perpetrators were (are) being prosecuted before ad hoc international courts and the recently established International Court of Justice (ICC).

Review Questions

1. What are the general mechanisms for the implementation of international law?
2. Why are the general mechanisms of implementation of international law deemed inappropriate for the implementation of IHL?
3. Which organs (entities) have responsibility in the implementation of IHL? How should these organs discharge their duty?
4. What constitutes war crimes under IHL and the Rome Statute?

5. Under what conditions can universal jurisdiction be applied? Can Ethiopian courts exercise universal jurisdiction over serious violations of IHL?

6. What do you understand by the principle of complementarity?

7. What is the justification for prosecution before international tribunal?

8. In 2006, President Yoweri Museveni of Uganda granted amnesty to members of Lords Resistance Army (LRA) on condition that they lay arms. Can such amnesty be a defense against international prosecution? Can prosecution be counter-productive?

9. What constitutes war crimes under IHL and the Rome Statute?

10. How do you see the law of diplomatic immunity in light of international criminal responsibility?

CHAPTER NINE: International Humanitarian Law in Ethiopian Cotext

INTRODUCTION

This chapter is intended to provide an overview of the status and application of international humanitarian law in Ethiopia. The chapter has two sections. The first section deals with the legal regimes governing international humanitarian law in Ethiopia which includes the constitution, the criminal law, international instruments ratified by Ethiopia, military rules, military manuals and code of conduct. As the last three are basically to be covered in military law course, the

discussions below focus on the first three. The second section deals with the application of international humanitarian law in Ethiopia. This section actually tries to initiate discussion and further research rather than provide case studies/practices.

9.1 Legal Regimes Governing International Humanitarian Law in Ethiopia

As already stated, International humanitarian law is part of public international law regulating the behavior of parties to an armed conflict (war). This law is basically to be incorporated in to and applied through domestic legal systems. From this perspective, it is important to assess to what extent the laws of war are incorporated in to the Ethiopian legal system. In this section, we will consider the constitution, the criminal law and international instruments ratified by Ethiopia. Although discussion of the subject should start from the constitution (as it is the supreme law of the land), it is better for purpose of clarity to begin with a discussion on IHL treaties to which Ethiopia is a party. This is so because the constitution itself makes reference to such treaties.

A) International Instruments ratified by Ethiopia

Ethiopia has ratified a number of international human rights and IHL treaties. It is important to keep in mind that some of the provisions of international human rights treaties can arguably invoked to protect victims of armed conflict (war). Apart from these, Ethiopia has ratified a number of IHL treaties that provide protections. According to some sources, until January 14, 2009, Ethiopia is a party to the following treaties:

1. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949.
2. Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949;

3. Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949;

4. Convention (III) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949;

5. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977;

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977;

Ethiopia is a party to the first four conventions as of 1969; the two Additional Protocols were ratified in 1994. As we will see in the following sub-section, by virtue of the constitution, these conventions form an integral part of the law of Ethiopia.

B) The Constitution of the Federal Democratic Republic of Ethiopia

As Ethiopia is a party to IHL treaties, the first constitutional provision relevant to IHL is one that is found under Article 9 (4). This article states that all international agreements ratified by Ethiopia are an integral part of the law of the land. By virtue of this provision, IHL treaties ratified by Ethiopia (the four Geneva Conventions and the two Additional Protocols) are part of the Ethiopian law, and hence should be respected or applied.

Another important constitutional provision relevant to IHL is Article 28, which deals with crimes against humanity. It provides that the criminal liability of persons who commit crimes against humanity shall not be barred by period of limitation. It also states such offences may not be commuted by amnesty or pardon of the legislature or any other State organ. The Constitution does not provide the definition of crimes against humanity. It rather states crimes against humanity are to be defined according to international agreements ratified by Ethiopia and by other laws of Ethiopia (for example the criminal law). However, it also provides an illustrative list of what constitutes crimes against humanity including genocide, summary executions, forcible disappearances or torture. In our previous discussions, we learned that these crimes constitute grave breaches of the Geneva Conventions with respect to which States have the duty to prosecute. Our Constitution goes further and says these crimes cannot be subject to period of limitation, amnesty or pardon. Thus, persons who commit crimes against humanity at peacetime or during war cannot go free. They can be prosecuted and punished at any time. This significantly contributes to the fight against impunity.

Article 18 of the Constitution on the prohibition against inhuman treatment is also relevant to the protection of victims of war. Sub-

article 1 states that every one (civilian, combatant or prisoner of war) has the right to protection against cruel, inhuman or degrading treatment or punishment. This provision shall apply even in case of armed conflict. Of course, many of the Constitutional provisions on human rights can be invoked to provide protection to victims of armed conflict and thereby regulate the behavior of parties to an armed conflict. As the general provisions of the Constitution are to be enforced through specific laws, one needs to consider the specific laws. One such law is the criminal law, which gives effect to international treaties and constitutional provisions relating to IHL.

C) The Criminal Code of the Federal Democratic Republic of Ethiopia

The Criminal Code of the Federal Democratic Republic of Ethiopia was promulgated in 2004(see Proclamation No. 414/2004), and no doubt has taken in to consideration the Constitution as well as IHL treaties (Conventions) ratified by Ethiopia. The Criminal Code of Ethiopia, among other things, provides a list of prohibited behavior during armed conflict (war) and provides the corresponding punishment. By imposing criminal responsibility on persons who violate it, the criminal law is meant to ensure the respect of the laws of war.

The Special Part of the Code (Part II) deals in its Title II (starting from Article 269) deals with crimes in violation of international law. This part of the Code is intended to ensure the enforcement and respect of international law including but not limited to international humanitarian law. As these crimes can be committed during an armed conflict (war), the provisions are relevant in regulating the behavior of parties to the conflict (war).

Accordingly, the Criminal Code of Ethiopia penalizes;

(1) Genocide Article 269;
(2) War crimes against the civilian population-Article 270;

(3) War crimes against wounded, sick or shipwrecked persons or medical services-Article 271;

(4) War crimes against prisoners and interned persons-Article 272;

(5) Pillage, piracy and looting-Article 273;

(6) Provocation and preparation regarding the above listed crimes-Article274;

(7) Dereliction of duty towards the enemy-Article 275;

(8) Use of illegal means of combat-Article 276;

(9) Franc Tireurs-Article 278;

(10) Maltreatment of, or dereliction of duty towards, wounded, sick or prisoners- Article 279;

(11) Denial of justice- Article 280;

(12) Hostile acts against international organizations (including the ICRC)- Article 281;

(13) Abuse of emblems and insignia of international humanitarian organizations- Article 282;

(14) Hostile acts against the bearer of a flag of truce-Article 283;

It can also be argued that some provisions of Title III of Part II dealing with military crimes and crimes against the defense forces and the police are relevant to IHL. Generally, the special part of the Criminal Code is aimed at protecting of victims of warfare as well as regulating means and methods of warfare. By so doing, the provisions are intended to ensure the respect of the minimum standards of conduct set under international humanitarian law.

In addition to the criminal law, the proclamation establishing the Defense Force and the military manual foreseen therein are relevant in understanding the rules that regulate warfare. But clear understanding of the scope of laws of war applicable under Ethiopian legal system requires further research.

9.2 Application of International Humanitarian Law in Ethiopia

As discussed earlier, to a certain extent, the rules of IHL are incorporated into the Ethiopian legal system through the Constitution and the Criminal Code sanctions their violation. However, their practical application is a subject to be explored. Faced with the urgency of preparing and submitting this material, time constraints prevent us from collecting and dealing with actual cases. The best we can hope is that students and instructors will undertake further research and fill the gap.

Summary

Ethiopia is a party to IHL treaties, particularly to the four Geneva Conventions and the two Additional Protocols as well as the 1954 Hague Convention on the protection of cultural property. According to Article 9 (4) of the FDRE Constitution, these conventions are part of the law of Ethiopia. The Constitution also provides that persons who commit crimes against humanity cannot benefit from lapse of period of limitation, amnesty or pardon (as there cannot be one). In addition, the constitutional provisions on human rights can be invoked to provide protection to victims of armed conflict. Finally, the Criminal Code of Ethiopia, by punishing certain behaviors, contributes to the respect of rules of IHL in Ethiopia.

Review Questions

1. It is true that the rules regulating warfare do not emanate from treaties only. We have, for example, rules of customary international humanitarian law. What is the status of such laws in Ethiopia?
2. Which provisions of the Geneva Conventions does the Criminal Code of Ethiopia enforce? Explain,

3. It seems that Ethiopia has not ratified those treaties that are generally classified as Hague Laws. Do you think Ethiopia should ratify these treaties (conventions)?

4. Should Ethiopia ratify the third additional protocol to the Geneva Conventions?

5. What means of warfare are prohibited under the Criminal Code of Ethiopia?

6. International law generally recognizes universal jurisdiction with respect to grave breaches of the Geneva Conventions. Can Ethiopian courts exercise universal jurisdiction? Discuss the problems related to the application of universal jurisdiction?

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