

International Humanitarian Law: Essence and Perspectives

From **Daniel Thürer**¹

The purpose of international humanitarian law or the law of armed conflict—formerly called the “law of war”—is to make warfare subject to the rule of law by limiting its destructive effects and mitigating human suffering. International humanitarian law has two types of response to the challenges of war. By means of the law of war it extends protection and assistance to those affected by the hostilities and regulates the means and methods of warfare. It is one of the oldest realms of international law. It is an ancient yet also open-ended project. And it requires constant effort.

What has international humanitarian law, in its well-established classic sense, done to meet the challenges posed by war? What are its structural strengths and deficiencies in dealing with the frequently changing face of conflict? What strategies, what rules has it devised to counter the “monster” of war?

International humanitarian law—the classic model

The rules of international humanitarian law applicable today are largely the result of the prevailing legal culture in the second half of the nineteenth century. Shocked by the reality of war, the Geneva citizen Henry Dunant did pioneering work in developing new, visionary humanitarian ideas and legal concepts. In his vivid book *A Memory of Solferino* (1862), he related one of the bloodiest battles of the century, which he had witnessed three years previously. Dunant set forth his idea of rules for the protection of wounded and sick soldiers that would be codified in an international treaty. His proposal rested on three pillars. The first was belief in the ability of law to limit and control violence, a conviction that

¹ LLD, Honorary Doctorate in Political Science, LL.M. (Cambridge), professor for international law, European law, public law and comparative constitutional studies, and director of the Institute of Public International and Foreign Constitutional Law at the University of Zurich. Though he is a member of the International Committee of the Red Cross, the views expressed by Daniel Thürer in this article are his own.

stood in marked contrast to the mentality of the period.² The second was the Enlightenment belief in universal values such as the idea that enemy combatants who fell into one's hands should be treated according to the same principles as one's own military personnel (whereas earlier rules and customs of warfare required this only within one's own cultural sphere, such as among Christians or Muslims). The third pillar—and a vital part of Dunant's own philosophy—was the focus on the individual, which represented unprecedented interference curtailing State sovereignty, a value that dominated the international law of the day. This focus placed Dunant and the Red Cross Movement ahead of his time. In the intervening period human rights have revolutionized the structure of international law.

These then were the basic forces behind international humanitarian law. Originally it comprised two bodies of law: the “law of Geneva” (the original Geneva Convention of 1864, which eventually developed into the much more far-reaching four Geneva Conventions of 1949) and the “law of The Hague”. Central to the law of The Hague are rules governing the means and methods of warfare, most of them codified by the 1907 Hague Peace Conference. Article 3 common to the four 1949 Geneva Conventions amounts to a “mini-convention” on non-international armed conflict, its provisions having been described by the International Court of Justice as “elementary considerations of humanity”.³ Both branches of law (Geneva and The Hague) were further developed (and drawn together) with the adoption in 1977 of the two Protocols additional to the Geneva Conventions. Protocol I concerns international armed conflict and Protocol II non-international armed conflict.

Fundamental challenges—assessing the state of the law

If we try to assess the quality of a body of law such as international humanitarian law, we must apply four criteria: Firstly) Are its rules still relevant and adequate? Do they meet the actual present needs of society? The problem the international community has been facing in recent years is first of all whether or not international humanitarian law represents a suitable framework for, and instrument in, the struggle against terrorism, or the “war on terror” as dubbed by the

² The notion that warfare could be subject to laws was certainly not shared by Dunant's contemporary, the German military commander Helmuth von Moltke, who believed that in war, like art, there was no general norm. Talent could not be replaced by rules. General dogmas, or rules derived from them or systems based on them, could therefore be of no practical value in devising strategy. See DAVID KENNEDY, *Of War and Law*, Princeton and Oxford, 2006, pp. 43 ff.

³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986, ICJ Reports 1986, 114, und *Case Concerning Corfu Channel*, Merits, ICJ Reports 1949, 22.

United States following the events of September 11, 2001? Secondly) Is the resulting system inherently hermetic in terms of what Sir Hersch Lauterpacht called the “reign of law”, i.e. the principle that no one—no matter how powerful—is above the law? Is there—to be more specific—room, in international humanitarian law, for a “legal vacuum” as the US government claimed in connection with the detention camp at Guantanamo Bay? Thirdly) Is the matter concerned adequately covered by comprehensive rules? Does customary international law fill gaps which are left open by traditional treaty law codifications? Fourthly) Are the rules effective in practice and are procedures in place to ensure their implementation? Is the system not plagued by serious and inherent weaknesses in terms of implementation?⁴

1. Relevance of international humanitarian law to the “war on terror”

In response to the attacks of September 11, 2001, the US president declared “war” on international terrorism. The word “war” is not to be understood metaphorically (such as in the “war” on poverty or the “war” on drugs) but literally. Upon closer examination, however, one sees that a distinction must be drawn between anti-terrorism measures that are part of armed conflict, whether international or non-international, and straightforward anti-crime measures. In terms of armed conflict, i.e. the military action taken by the United States and its coalition partners in Afghanistan in 2001–2002, international humanitarian law proved relevant and adequate. But to apply the rules of that law to all measures taken in the framework of the worldwide anti-terrorism effort would run counter to its content, purpose and spirit. International humanitarian law permits intrusions into people’s lives and freedom that can be justified only in the extreme conditions of war. And—a fact apparently not understood by Washington—it stipulates equal rights and obligations for all warring parties. Various rounds of deliberation by experts that took place following the September 11, attacks revealed a broad consensus that despite modern transnational terrorism, international humanitarian law had lost none of its relevance or adequacy and therefore did not need fundamental reform.

2. Are there gaps in the protection afforded by international law?

The Guantanamo Bay detention centre has hundreds of inmates—both combatants captured in Afghanistan and common criminals—deprived of all rights under international humanitarian law, international human rights law and the US Constitution. The facility symbolizes an attempt to create a legal no-man’s-

⁴ See DANIEL THÜRER, *Humanitäres Völkerrecht und amerikanisches Verfassungsrecht als Schranken im Kampf gegen den Terrorismus*, Zeitschrift für Schweizerisches Recht, 2006/1, pp. 157 ff. Likewise *Guantánamo: Ein „Legal Black Hole“ oder ein System sich überschneidender und überlagernder „Rechtskreise“?*, Schweizerische Zeitschrift für internationales und europäisches Recht, 2004, pp. 1 ff.

land. In particular, it has been claimed that there exists a category of “unlawful combatants” who are not entitled to any protection under humanitarian law. Recognition has not been forthcoming for the applicability of international humanitarian law, not even for the right of captured persons, as laid down in Article 5 of the Third Geneva Convention (protecting prisoners of war), to have a competent, independent and impartial court determine whether they have prisoner-of-war status. It is interesting to note that the US Supreme Court recently declared itself at least partly opposed to the stance taken by the executive branch. The Court did not itself pronounce⁵ on whether the Third Geneva Convention as a whole was applicable, but nevertheless ruled that Article 3 common to all four Conventions did apply and that the military commissions in Guantanamo Bay were thus not adequate to meet the minimum procedural requirements.

3. Is the law incomplete?

International humanitarian law is intended to be universal. The four Geneva Conventions have become universally applicable now that all the world’s 194 States are party to them. This is not (yet) the case for the Additional Protocols of 1977. Important States such as the US, India, Pakistan, Iraq, Iran and Israel that are involved in acute or potential international crises are not yet bound by Protocol I. States such as Nepal and Myanmar, which are at present particularly plagued by internal violence, have declined to become party to Protocol II. Faced with a flagging number of treaty ratifications, the 26th International Conference of the Red Cross and Red Crescent, held in 1995, assigned the ICRC the task of carrying out a survey of the customary rules of international humanitarian law that are applicable in both international and non-international armed conflicts. In 2005 the ICRC published a two-volume work⁶ that gauges the extent to which international humanitarian law today has the force of customary law. As ICRC President Jakob Kellenberger put it, it captures the clearest possible “photograph” of that law.⁷

This study represents a historically unique and monumental exercise in the systematic compilation of international law. It is not yet certain whether the rules identified by the experts will all be recognized by States as customary. It is nevertheless a striking fact that the experts found that the majority of the rules so far enshrined in treaty law have the force of customary law and are therefore binding on all States, and that these rules have also attained customary force in terms of internal armed conflict.

⁵ *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, No. 05-184, decided June 29, 2006.

⁶ JEAN-MARIE HENCKAERTS/LOUISE DOSWALD-BECK (eds.), *Customary International Humanitarian Law*, 2 vol., Cambridge, 2005.

⁷ See Foreword by Dr. Jakob Kellenberger, in: Henckaerts/Doswald-Beck, op. cit. xi.

Mention is also deserved of an endeavour to codify minimum humanitarian standards that must be upheld in situations of internal violence whatever the circumstances: These standards would apply even if the threshold of non-international armed conflict has not been reached and—because a state of emergency is in force—international human rights guarantees have, apart from an inalienable core, been suspended. Unfortunately, the private initiative to bring this about—the Turku Declaration of 1990—had no formal outcome.⁸

4. Weaknesses in terms of implementation?

The study's conclusion regarding the creation of rules of international humanitarian law is impressive indeed. But this has not prevented sharp criticism of that law in terms of failure to implement it. The fact is, that implementing humanitarian law depends to a large extent on the political will of States, despite the fact that the Geneva Conventions contain a mechanism for monitoring by the States Parties not directly involved. This mechanism consists of a system of protecting powers (which, it is true, has never been implemented) and an ICRC mandate (effective in practice) for the purpose of guaranteeing compliance. Nevertheless, the legal situation has improved in terms of compliance. The main factor here is the increasing role being played by the courts. After the war crimes tribunals in Nuremberg and Tokyo, the ad hoc tribunals for the former Yugoslavia and for Rwanda were set up by the UN Security Council in 1993 and 1994 respectively and, on the basis of the internationally agreed Rome Statute of 1998, the International Criminal Court was established. This is intended to make a reality of the universal jurisdiction provided for in the Geneva Conventions for the prosecution and judgment of war criminals. As mentioned above, on several occasions the International Court of Justice has also considered basic issues of international humanitarian law.⁹ In addition, human rights systems increasingly provide for proceedings before courts (international or regional) or commissions to supervise the implementation of treaties. And it is also possible to base proceedings before political organs of international organizations or States on international humanitarian law. As the UN Security Council reminded the belligerents during the Balkan conflict, "all parties are bound to comply with the obligations under international humanitarian law and in particular the

⁸ See THEODOR MERON, *Contemporary Conflicts on Minimum Humanitarian Standards*, in: Karel Wellens (ed.), *International Laws: Theory and Practice—Essays in Honour of Eric Suy*, The Hague, Boston and London, 1998, pp. 623 ff., and HANS-PETER GASSER, *Humanitarian standards for internal strife—A brief review of new developments*, *International Review of the Red Cross*, May–June 1993, pp. 221 ff.

⁹ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996 (Advisory Opinion); *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986; *Case concerning the Corfu Channel*, ICJ Reports 1949; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2003 (Advisory opinion).

Geneva Conventions of 12 August 1949".¹⁰ In future, national courts will doubtless also play an increasing role in enforcing implementation.¹¹

Warfare in the shadow of the law

The law concerns itself ever more closely with war. Are we about to enter a "brave new world" in which imperatives of international law succeed in taming the cruelties of war? Or is the belief in law as something that will make a better world mere wishful thinking which fools us into not perceiving dark reality? Sigmund Freud suggested that there exists within human beings a clash between two basic drives: the drive to destroy (*thanatos*) and the drive to preserve and reproduce life (*eros*). Is it possible that people today are undergoing a process of change—as a result of psychological metamorphosis bound up with cultural processes—to the extent that it will cause us in future to be outraged by the very idea of war, to simply no longer tolerate it, to experience a basic emotional refusal—a "constitutional" intolerance—of war?¹² Or will a penchant for brutality and destruction be part of human nature as long as humans exist?¹³

What is evident (and different from earlier periods in history) is the modern trend in international politics to arrange the goals of war in clear categories and to define those goals in juridical terms. The military campaign in Afghanistan was viewed as permissible because it was based on the right to self-defence as laid down in the UN Charter. The 2003 war against Iraq, on the other hand, appeared to be in violation of international law since it lacked approval by the Security Council. In addition, acts of war are ever more frequently measured by NGOs, international organizations, States and public opinion using the yardstick of international humanitarian law. And public opinion reflects criticisms made in those terms. For example, the media covered widely the bringing of charges at the International Criminal Court in The Hague on 27 February 2007 against a member of the Sudanese government and a militia commander for war crimes and crimes against humanity. And along with the growing importance attached to international humanitarian law, it is acknowledged that education in that law is today essential in political, administrative and even economic circles.

¹⁰ Resolution 764 (1992), para. 10.

¹¹ See, as a recent example, 1. The Public Committee against Torture in Israel, 2. Palestinian Society for the Protection of Human Rights and the Environment versus 1. The Government of Israel, 2. The Prime Minister of Israel, 3. The Minister of Defense, 4. The Israel Defense Forces, 5. The Chief of the General Staff of the Israel Defense Forces, 6. Shurat HaDin—Israel Law Center and 24 others, HCJ 769/02, Nr. 61.

¹² The Einstein–Freud Correspondence (1931–1932)—See *Einstein on Peace*, Otto Nathan and Heinz Norden (ed.), Schocken Books, New York, 1960, pp. 186–203

¹³ See JONATHAN GLOVER, *Humanity—A Moral History of the Twentieth Century*, London 2000.

This certainly applies to political decision-makers, in government or in international organizations. And above all, it is demanded that those involved in armed hostilities must have knowledge of what is allowed and what is not. A soldier must know what he may, and may not, shoot at when no superior is there to give him orders.

However, a look at the world situation also shows the sad, dark state of the international community's peace-promoting and humanitarian endeavours. True, there are more peace-keeping operations than ever before. On the whole, however, what is striking is the frequency with which the international political community ducks its responsibility for maintaining peace and takes refuge in humanitarian operations (thus making real humanitarian work more difficult), and above all how tardy and sluggish it has shown itself to be when it comes to shouldering the task of ensuring international security.¹⁴ The international political community did not manage to save the Muslim men in Srebrenica from massacre,¹⁵ or to remedy the anarchy in Somalia, or to prevent civilians in Darfur from being killed, tortured, raped, driven from their homes and having their property destroyed.¹⁶ This failure is, of course, not primarily the fault of the organizations as such, whether the United Nations, the European Union or other entities, for they cannot take measures without the political will of the States to support them. Despite progress in the realm of humanitarian law itself and humanitarian action on the ground, examples of feeble or non-existent implementation of that law should keep in check any euphoria.

What is especially important in our present context is that the way war is fought has changed. Battlefield scenes such as those witnessed in Solferino are no longer played out. The terrible confrontations between industrialized armies that characterized the two world wars are probably a thing of the past. Partisan and guerilla wars are today far more frequent than wars between States. Wars thus often take the form of struggles between rebels and governments—such as the present conflict in Sudan—or of clashes between gangs, clans and warlords in failed States, as in recent years has been the case in Somalia, Sierra Leone or Liberia. In addition, instead of uniformed soldiers we now increasingly see combatants under the command of warlords. The traditional “citizen soldiers” of State armies are being replaced by private armies; it is said that 4,000 person-

¹⁴ See DAVID KENNEDY, *The Dark Sides of Virtue—Reassessing International Humanitarianism*, Princeton/Oxford, 2004, pp. XXV ff.

¹⁵ ICJ, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Decision of 26 February 2007.

¹⁶ MICHAEL BOTHE, *International Legal Aspects of the Darfur Conflict*, in: August Reinisch and Ursula Kriebaum (eds.), *The Law of International Relations—Liber Amicorum Hanspeter Neuhold*, Utrecht, 2007, pp. 1 ff.

nel from private security firms are deployed in Iraq alone.¹⁷ One may well ask whether the type of warfare from which international humanitarian law arose still exists given warfare's various present-day manifestations.

To conclude: the face of war has changed over history.¹⁸ Neither duels fought by heroes nor massive confrontations between armies fielded by entire represent today's reality. Armed conflict within the confines of a single country or a mixture of internal and international conflict are today the prevailing types of warfare. Today's wars are generally no longer waged on a geographically defined battlefield, but rather in towns and cities, streets, squares and fields stretching over huge distances. Modern military operations are increasingly being carried out electronically and at a distance from those conducting them. This modern paradigm of war has been described by one expert as "wars between people".¹⁹ They are primarily characterized by attacks on the civilian population and by extreme brutality. Rules intended to limit the use of force have to be further developed, be it on the international or domestic plane, or be it in form of legally binding rules or standards not in a strictly legal form. They are fundamental to any civilization based on the rule of law and its underlying philosophy.

¹⁷ See Volume 88, Number 863 of the International Review of the Red Cross on "Humanitarian debate: Law, policy, action—Private military companies"; DANIEL THÜRER/MALCOLM MACLAREN, *Military Outsourcing as a Case Study in the Accountability and Responsibility of Power*, in: August Reinisch and Ursula Kriebaum (eds.), *The Law of International Relations—Liber Amicorum Hanspeter Neuhold*, Utrecht, 2007, p. 391 ff.

¹⁸ See HERFRIED MÜNKLER, *Der Wandel des Krieges—von der Symmetrie zur Asymmetrie*, Weilerswist/Göttingen, 2006.

¹⁹ RUPERT SMITH, *The Utility of Force—The Art of Force in the Modern World*, London, 2006, p. XIII.