

## INTRODUCTION

IHL protects the life and dignity of persons affected by armed conflicts, but only to the extent States consider their respect to be compatible with the legitimate aim of an armed conflict to weaken the military potential of the enemy. The precise protection offered by IHL depends on the classification of the conflict as international or non-international, the classification of the affected person as a civilian or combatant and many other legal categorizations.

IHL is marked by four main features. First, IHL applies only during situations of *armed conflict*, or, in other words, violent situations resulting from a failure of the law that threaten the very survival of the individual, communities or States. Second, IHL mainly protects the life and dignity of persons who are perceived as the *enemies* of one of the parties to the armed conflict. Third, international armed conflicts (IACs) would not exist today if States respected the prohibition of the use of force in international relations, which is one of international law's most important rules. Fourth, IHL is *part of public international law*, which is characterized as a mainly self-administered horizontal legal system that lacks a centralized system of adjudication and enforcement for most of its rules. Consequently, IHL too suffers from the absence of a centralized adjudication and enforcement system. These four features of IHL not only weaken it, but also would make it surprising if the parties to a conflict always respected IHL or if its rules were uncontroversial. **1.01**

Hersch Lauterpacht once wrote that 'if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.'<sup>1</sup> Nevertheless, one may also consider that IHL necessarily exists as long as armed conflicts exist. In contrast to laws that merely prohibit criminal conduct, international law not only prohibits armed conflicts but also prescribes how armed conflicts should be conducted. Indeed, IHL is one of the oldest branches of public international law. **1.02**

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1 Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 BYBIL 360, 381–2.

**1.03** IHL is less humanitarian than peacetime law by necessity because it must be sufficiently adapted to the dire reality of armed conflicts. It may therefore be better to refer to IHL as the laws of war or laws of armed conflict as the military, one of the main societal groups that use and apply IHL, prefers to call it. Its substantive rules try to limit the use of violence in armed conflicts by:

1. prohibiting the use of violence against persons who do not or who no longer directly participate in hostilities (therefore all persons in the power of the enemy must be treated humanely at all times); and
2. restricting the level of violence to the amount necessary to achieve the only legitimate aim of the conflict, which is to weaken the military potential of the enemy.

**1.04** These two objectives generate not only specific principles of IHL but also highlight some of its limitations:

1. the separation between the rules on the legitimacy of resorting to an armed conflict (*jus ad bellum*) and the rules on how armed conflicts must be conducted (*jus in bello*) to which IHL belongs;
2. the distinction between civilians and combatants;
3. the prohibition against attacking persons who are *hors de combat*;
4. the prohibition against inflicting superfluous injury or unnecessary suffering; and
5. the principles of necessity and proportionality.

**1.05** As a result of the separation between *jus ad bellum* and *jus ad bello*, IHL applies independently of the legitimacy of the cause for which a party or an individual is fighting. This separation implies a key limitation of IHL (at least from the viewpoint of those who are fighting): it imposes the same legal obligations on all parties to a conflict while concurrently providing equal protection to all persons affected by the conflict, irrespective of whether the parties or individuals are fighting for a just or unjust cause.

**1.06** The distinction between combatants and civilians, in turn, highlights another important limitation of IHL: as combatants are part of the military potential of the enemy whereas civilians are not, IHL cannot protect both civilians and combatants in the same manner. The criterion for distinguishing between the two main categories of individuals is, at least in modern IHL, not based on innocence or guilt but rather on status in IACs and a controversial mixture of affiliation as well as conduct in non-international armed conflicts (NIACs).

Finally, the prohibition against inflicting superfluous injury or unnecessary suffering implies a further limitation from a humanitarian point of view: IHL does not prohibit violence or even deliberate infliction of suffering as long as such actions are indispensable for achieving the legitimate aim of weakening the enemy's military potential. **1.07**

The foregoing principles and resulting limitations demonstrate not only the inevitable constraints of IHL but also its underlying rationale – a rationale that ultimately fails if the parties to the conflict have aims that are either irrational or inherently incompatible with IHL. **1.08**

A great IHL expert, Eric David, once noted that IHL is characterized both by its simplicity and its complexity.<sup>2</sup> Fortunately, one does not have to study this book to understand many of IHL's most important rules for those affected by armed conflicts as most of those rules are relatively simple and straightforward. Indeed, one does not have to be a lawyer to understand that it is prohibited to torture, rape or summarily execute detainees as well as to deliberately attack or starve civilians, although the limitation of the last two prohibitions to civilians already requires complex distinctions that will be discussed in this book. If such simple rules are violated, it is not because the rules are unknown or misunderstood, but because they are not respected. This book will therefore extensively discuss compliance with IHL and the legal means to improve such compliance before even addressing IHL's substantive rules. I would like to take this opportunity from the outset to apologize to the reader that this book will focus on IHL's complexities and nuances. Indeed, determining the exact IHL rules that apply as well as the extent and sometimes even the very existence of protection offered by IHL depends upon making sophisticated distinctions that require answering several questions, in particular: **1.09**

1. whether an international or non-international armed conflict exists;
2. whether the individual affected by the conflict is a civilian or a combatant;
3. whether that person is in the power of the party affecting him or her;
4. whether a civilian is found in a State's own territory or in an occupied territory;
5. whether such a civilian is interned for imperative security reasons, to await trial or to serve a sentence;
6. whether a civilian affected by hostilities was directly targeted or only an incidental victim of an attack and, in the latter case, what was actually targeted and how important that target was for the attacker's military aims.

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2 Eric David, *Principes de droit des conflits armés* (5th edn, Bruylant 2012) 975.

**1.10** It is therefore easily understandable why more than 600 pages are needed to explain IHL's complexities and nuances, the interplay of IHL with other branches of international law and all of its legitimate as well as unfounded legal controversies. This book emphasizes:

1. problems relating to IHL's respect, implementation and enforcement;
2. whether rules of IHL of IACs may also be applied in NIACs;
3. the interplay between IHL and rules of other branches of international law;
4. the perspective of non-State armed groups;
5. controversial as well as new issues; and
6. issues that learners typically have difficulties with when simply reading the treaty texts and customary rules identified by the ICRC Customary IHL Study.

**1.11** By opposition, this book only dedicates limited space to summarizing rules that learners may easily understand reading the treaty texts (which are anyway explained in detailed ICRC commentaries), although such rules are crucial to guarantee that persons affected by armed conflicts are afforded a minimum level of respect. Thus, for example, the prohibition of rape, the detailed rules on the treatment of POWs and civilian internees during internment or the prohibition of medical experiments are only mentioned in passing.