



INTERNATIONAL HUMANITARIAN LAW: applicability, responsibilities and limits in war

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ABSTRACT

The ongoing global conflicts necessitate a comprehensive examination of International Humanitarian Law and its application in combat scenarios. This article investigates International Humanitarian Law (IHL), its implementation in armed conflicts, the associated challenges, and potential liabilities. The research elucidates the nature of IHL, its application in disputes, the normative and ethical constraints imposed on conflicts arising from this system of international protection of Human Rights, and the difficulties in effective implementation through analysis of contemporary cases, such as the conflict between Russia and Ukraine, and between Israel and the Hamas Group. Additionally, the study considers the responsibilities imposed on those who violate the regulations established by IHL.

Keywords: International humanitarian law, armed conflicts, constraints, liabilities.

1 INTRODUCTION

This paper aims to examine the application of International Humanitarian Law (IHL) in armed conflicts and the challenges of its use in recent practical cases, in the years 2022 and 2023. In contemporary times, the debate about the system of human rights protection known as International Humanitarian Law (IHL) in war is crucial, given the outbreaks of war that have occurred and the challenges faced in applying IHL efficiently in these scenarios.

Over the centuries, there has been a notable evolution of the protection system in question, given the international concern to promote world peace. However, alongside these advances, there have also been wars that have challenged the effectiveness and application of these regulations, such as the wars between Russia and Ukraine and Israel and the Hamas Group. These wars had worldwide repercussions, given the destruction of the places where the clashes took place.



The study, therefore, aims to explore the moral and normative limits imposed by International Humanitarian Law, how it is applied in theory and the challenges of its applicability in practical situations, since even in the face of established limits it is possible to see transgressions, as in the conflicts mentioned above.

In addition, by exploring the repercussions of IHL on war today and whether or not it is complied with, the aim is to determine the possible responsibilities that can be attributed in the event of a violation of these norms. Thus, this research aims to contribute to a study that emphasizes the relevance of the functions of IHL and, to this end, the bibliographic research method was used.

2 INTERNATIONAL HUMAN RIGHTS PROTECTION SYSTEMS

Human rights, according to Piovesan (2019), are innate and crucial rights of the individual and are inherent to them simply because they are human beings. In this context, there are international protection systems designed to protect the aforementioned rights. They are: International Human Rights Law, International Refugee Law and International Humanitarian Law.

2.1 INTERNATIONAL HUMAN RIGHTS LAW

According to Ramos (2022), the genesis of international human rights law took place after the Second World War, in response to the repudiation of the acts of the Nazi regime. Against the backdrop of the events of the Second World War, the Universal Declaration of Human Rights was approved in 1948.

According to Mazzuoli (2021a), the system in question aims to protect the rights of all people, that is, the human rights that are inherent to them, regardless of their nationality, situation or location. The sole aim is to ensure that, by the mere fact of existing, the individual's dignity is generally guaranteed. This can also be found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and many other instruments that have made this point over time.

Internationally, progress has been made through treaties, international agreements and other means aimed at guaranteeing these rights. The international human rights protection system is divided into two: global and regional. Although there is such a division, there is a need to internalize the fact that these are complementary

systems and there is no suppression of one by the other, as explained by Mazzuoli (2021a, p. 61):

The normative structure of the international human rights protection system is made up of global and regional instruments. The instruments of a global nature belong to the United Nations protection system (or “onusian” system); those of a regional nature belong to one of the three regional systems that exist today: European, Inter-American or African. (Mazzuoli, 2021a, p. 61)

The Global system refers to the UN - United Nations Organization, and is made up of the 1945 Charter of the United Nations Organization (UNO), which, in addition to other matters, aims to strengthen the promotion of human rights and individual freedoms through international cooperation, the greatest of which is the promotion of peace, as extracted from reading the UN Charter.

On another front, the regional system includes the African System, the European System and the Inter-American System. “Alongside the global system, regional protection systems have emerged, seeking to internationalize human rights at regional level, particularly in Europe, America and Africa” (Piovesan, 2019, p. 114).

2.2 INTERNATIONAL HUMANITARIAN LAW

The basic concept of International Humanitarian Law can be found in the dissertation “The International Committee of the Red Cross”, Santos (2014):

International humanitarian law is made up of a set of rules that, through humanitarian issues, tries to set limits on the effects of armed conflicts, protects people who do not take part in hostilities as well as those who do not, and limits the means and methods of warfare. (Santos, 2014, p. 6).

Christophe Swinarski describes International Humanitarian Law as having two objectives: “to limit the use of certain means of combat in hostilities and to protect the victims of the conflict” (Swinarski, 2003, p. 36).

According to Mazzuoli (2021b), humanitarian law was one of the foundations for the construction of international human rights law. The majority of scholars believe that International Humanitarian Law had its embryo formed at the Battle of Solferino.

In the book *Un Souvenir de Solférino* by Jean Henry Dunant, founder of the Red Cross, it is reported that while on his way to Italy for personal reasons, he passed through Castiglione della Pieve and meanwhile the Battle of Solferino was being fought. In his book, Dunant recounts the horrors he encountered as a result of the

battle, such as the inhuman conditions to which the men were subjected and how he rescued some of them.

Later, Dunant presented ideas so that in future wars there wouldn't be as much suffering as he had witnessed. It was the embryology for the formation of what is now known as the International Committee of the Red Cross - ICRC.

International Humanitarian Law, as explained above, is a system of protection aimed at minimizing the suffering caused as a result of an armed conflict, and to this end it regulates the behavior of the parties. The main regulations of IHL are the Geneva Conventions and their 1977 Additional Protocols.

2.3 INTERNATIONAL REFUGEE LAW

According to the teachings of Ramos (2022), International Refugee Law consists of a system that aims to protect refugees from the moment they leave their country until they are definitively welcomed in another country.

According to Jubilut (2007) "The institute of refuge emerged at the beginning of the last century, more precisely in the 1920s". The author explains that its fundamental beginnings were the escapes from the now-defunct Soviet Union as a result of its political and economic situation, especially the Bolshevik Revolution, which was in vogue at the time. As a result of these escapes, the Red Cross asked the League of Nations for support. Subsequently, the High Commission for Russian Refugees was created, which is where international protection for refugees began.

However, in 1950, the United Nations High Commissioner for Refugees (UNHCR) was established, which is currently responsible for assisting and protecting refugees, as well as supporting stateless people.

It should be noted that the Soviet population's escapes were caused by political and economic reasons, as explained above. Today, this meaning is no longer accepted. The concept of a refugee today is: a person who does not want to leave their country but is forced to flee due to well-founded fears of persecution, usually because of war, human rights violations, persecution, etc. The Convention relating to the Status of Refugees defines a refugee as a person who:

[...] fearing persecution for reasons of race, religion, nationality, social group or political opinion, is outside the country of his nationality and is unable or, because of that fear, unwilling to avail himself of the protection of that country. (UN, 1951, **emphasis added**).

Contrary to what had been observed, in order for International Refugee Law to protect refugees, flight must be motivated by a well-founded fear. Having said that, when people leave their homeland for financial reasons, for example, they are economic migrants.

Economic migrants leave their countries for financial reasons and leave voluntarily in search of better living conditions, with the protection of their governments. Refugees, on the other hand, are coerced into leaving their country out of fear for their lives, since they have no protection from their states at the time (Dantas, 2010, p. 42).

3 INTERNATIONAL HUMANITARIAN LAW IN WAR

In his work “The Law of War and Peace” (1625), Hugo Grotius discussed the justice of war (*jus ad bellum*), i.e. there must be a legitimate cause for war to break out. The author also addressed the Rules of War (*jus in bello*), which would be the appropriate conduct during war (Grotius, 2004).

The International Committee of the Red Cross (ICRC) explains what the concept of *jus in bello* and *jus ad bellum* consists of. The former aims to reduce the suffering resulting from armed conflicts, while the latter translates as the right of one nation to wage war against another based on the possible lawfulness of the use of force. International humanitarian law is now seen as synonymous with *jus in bello*, given its definition:

International humanitarian law sets out the rules applicable during armed conflicts, whether international or not, which have a twofold objective: to restrict the rights of combatants by limiting the methods and means of warfare and to protect the rights of non-combatants, civilians and military personnel outside of combat (Paula, 2009, p. 11).

It should be pointed out that the *jus ad bellum*, according to the United Nations Charter, should only be accepted in cases of self-defense when authorized by the United Nations Security Council (UNSC) or when the UNSC deems it appropriate, given the preference for peaceful solutions.

As a result of the conflicts that have occurred throughout human history, attempts have been made to create regulations so that wars become, as far as possible, more compassionate, avoiding greater brutality. Santos (2014) explains in his dissertation that the rules governing IHL aim to establish certain restrictions on armed conflicts.

The sources of International Humanitarian Law, according to Paula (2009), are customary, but most of them have been made law, with a focus on the Geneva Conventions, which set limits on wars.

[...] As for ratification, the particular characteristic of International Humanitarian Law comes mainly from the universality of the system. As is well known, the Geneva Conventions currently enjoy the greatest universality of all the conventional systems in force, with 189 states adhering to them [...] (Swinarski, 2001, p. 40).

The First Geneva Convention of 1864 established that in the event of a land war, combatant soldiers and the sick, both civilian and military, must be protected. Among other rules, it was determined that the duty of medical care and humanitarian treatment would extend to everyone, regardless of nationality. In evidence: “The wounded or sick must be respected and protected in all circumstances. They shall be treated and cared for humanely by the Party fighting that has them in its possession” (Brazil, 1957). Furthermore, there must be no inhuman or degrading treatment.

Any attack on their lives and persons is strictly forbidden; in particular, they must not be murdered, exterminated, or subjected to torture or biological experimentation, they must not be left premeditatedly without medical assistance or care, nor exposed to risks of contagion or infection. (Brazil, 1957).

The Second Geneva Convention of 1906 extended the regulations laid down in the First Convention to include naval forces, the wounded and sick, as well as shipwrecked people. The Third Convention of 1929 concerns prisoners of war. In summary, prisoners cannot be treated inhumanely, such as being tortured; they must be identified and kept in suitable places of detention, enjoying their minimum rights to human dignity, such as food and hygiene; it is not permitted to use coercive means to make prisoners reveal information; they can communicate with the Red Cross/Crescent; and, finally, it establishes that at the end of the war prisoners must be released quickly.

Finally, the Fourth Convention of 1949 concerns the protection of civilians. Among other regulations, it was established that civilians must be protected from violence or hostile actions against them, that they must be treated with dignity, that they have the right to assistance and shelter during wartime, and that religious, cultural and historical assets must be preserved.

Furthermore, as can be seen from Paula's (2009) quote above, although the name International Humanitarian Law alludes to a global scenario, this system is not restricted to the international arena. It is important to note that IHL also operates within countries in cases of conflicts within national borders. In the words of Liliana Lyra Jubilut (2007, p. 145):

Another example of the breadth of international humanitarian law is the fact that it can be applied to both international and internal conflicts, which would be outside the scope of classical international law. The concern with internal conflicts is extremely relevant, as it allows for the protection of life and human dignity in situations where their violation is more pronounced, due to the absence of rules of international law, which leaves their victims at the mercy of the protection of their state, which is often a party to the conflicts, a fact that prevents the guarantee of the fundamental rights of individuals (Jubilut, 2007, p. 145).

3.1 RESPONSIBILITIES FOR NON-COMPLIANCE WITH IHL RULES

Violations of the rules laid down in IHL conventions, especially the Geneva Convention and its additional protocols, constitute criminal offenses. Infractions considered serious imply responsibility on the international stage. The International Committee of the Red Cross explains:

Many of the rules relating to international armed conflicts are set out in the four Geneva Conventions of 1949 and Additional Protocol I of 1977. States have an obligation to repress all violations of these instruments. There are, however, specific obligations regarding certain serious violations.

Serious violations are some of the most serious violations of humanitarian law [...]. Serious offenses are considered war crimes (ICRC, 1998).

It is claimed that the responsibility lies primarily with states to prosecute those who have committed acts in violation of IHL. "Serious violations of IHL are considered war crimes and it is primarily the obligation of states to try and prosecute these international criminals" (Gorga, 2019, p. 552).

If there is no accountability at the domestic level, the International Criminal Court (ICC), for those states that are signatories to the Rome Statute, with regard to the accountability of individuals, and the International Court of Justice (ICJ) in relation to the member countries of the United Nations (UN), with regard to the accountability of states, play the role of investigating acts of infraction.

When a war crime, crime against humanity, genocide or aggression is committed at the international level, the International Criminal Court (ICC) comes into

play for its signatories, according to the Rome Statute. In the meantime, deliberately attacking civilians, destroying or appropriating property other than for military necessity, attacking physical integrity and health, intentional homicide, among others, are considered war crimes according to the Geneva Conventions and their Additional Protocols. As a result, the perpetrators can be submitted to the jurisdiction of the ICC, in accordance with Article 5 of the Rome Statute, for accountability.

Furthermore, the state can be held responsible for practices that violate IHL. In his monograph, Siqueira (2011) cites André Nollkaemper, who argues that states can be held responsible for international crimes in such a way that one of the objectives of this responsibility would be to provide reparations as financial compensation to those who have suffered damage. Additional Protocol I is at the heart of it:

A Party to the conflict that violates the provisions of the Conventions or of this Protocol shall be obliged to pay compensation if the case so warrants. It will be responsible for all acts committed by the people who make up its Armed Forces (Brazil, 1957).

Jean-Marie Henckaerts and Louise Doswald-Beck also corroborate this:

Norm 150. A State responsible for violations of international humanitarian law must make full reparation for the loss or damage caused [...]. State practice stipulates this rule as a norm of customary international law applicable in both international and non-international armed conflicts. (Henckaerts; Doswald-Beck, 2005, p. 600).

However, there are also treaties and conventions aimed at reducing armed conflicts or regulating them as far as possible, such as the Hague Conventions of 1899 and 1907, the United Nations Conventions of 1981 and the Treaty of Paris of 1993, among others.

4 LIMITS IN WAR

Despite efforts on the international stage over the centuries to contain conflicts or at least make them less bloody, war is still a reality and hostilities persist. The limits set by IHL are still a constant challenge in the international community, given the existence of various instruments to repress wars and the persistence of their occurrence. Examples of this are the recent conflicts between Ukraine and Russia (starting in February 2022), as well as the current conflict between Israel and the Hamas Group (starting in October 2023).

A few decades ago, the world witnessed two war conflicts of global proportions. At that time, there were already some limits imposed by IHL, such as the Hague Convention of 1899 and the Geneva Conventions of 1864, 1906 and, prior to the Second World War, the Geneva Convention of 1929, in addition to customary rights. However, as the historical facts show, they were not enough to curb it at the time, given the outbreak that occurred.

Although there is currently no war of the proportions described, there are still disputes. This can be seen in the recent conflicts between Russia and Ukraine and between Israel and Hamas.

In the book *Customary International Humanitarian Law* by Jean-Marie Henckaerts and Louise Doswald-Beck, research was carried out in different countries and, consequently, regions of the globe, as can be seen from the introduction, on customary IHL regulations and practices in armed conflicts. This research elucidated the ethical and moral limits present in wars over the years, as a result of customs. Therefore, it is not possible to legally demand a position based on conventions and treaties from those who are not signatories, but it is possible to demand an ethical stance.

Initially, one of the limits addressed in the work in question was the principle of distinction, which establishes that in a conflict there must be a distinction between civilians and combatants, in other words, in a war one must seek only to shake the enemy troops. This is also clear from the Fourth Geneva Convention. However, in the interim of proceeding according to custom or according to the rules stipulated in the Convention, such situations do not arise.

As a result of the conflict between Russia and Ukraine, according to Fonseca (2024), 700,000 people are expected to leave the country by February 2024. Furthermore, on October 7, Hamas attacked Israel, triggering a new conflict in the Middle East.

Furthermore, the compilation by Henckaerts and Doswald-Beck (2005) states that there are people and goods that must be protected in a war, so that goods cannot be attacked indiscriminately without distinguishing which are military and which are civilian. This is also clear from the IHL Conventions, especially the Geneva Conventions. However, hospitals were bombed and residential buildings attacked, according to a report by Yau (2022), among others.

The work in question explains the principle of proportionality, which corroborates the other limits set out:

It is forbidden to launch an attack that can be predicted to cause accidental loss of life or injury to the civilian population, or damage to civilian property, or both, and which would be excessive in relation to the concrete and direct military advantage anticipated (Henckaerts; Doswald-Beck, p. 51).

On the other hand, the limits set by IHL also call into question the responsibilities of states and individuals who commit crimes on the international stage that seriously violate humanitarian principles. As already mentioned, the IHL regulates both international conflicts and those that occur within countries, but it is when it comes to accountability that the problem arises. Some situations that make the application of IHL difficult are found in the context of the conflict between Israel and Hamas, since the latter is a non-state organization and any international accountability becomes unknowable, outside the internal scope of the state.

The United Nations (UN) has issued an opinion on the situation in Israel, warning that the actions to block supplies such as food and attacks on hospitals amount to war crimes. And because Israel is a signatory to the 1977 Additional Protocols and the Rome Statute, it could generate liability at the International Criminal Court, according to Stabile and Casemiro (2023). On the other hand, the application of responsibility to Hamas, due to the commission of a crime, is uncertain, since they are not a state, as Maguire (2023) explains, and for this reason there is no possibility of them being signatories to conventions and the sanctions that result from them.

However, Palestine has agreed to submit to the ICC, so it is possible that agents could be brought before the Hague:

If individual Hamas militants are arrested, they could be charged with war crimes and tried in Israeli courts or at the International Criminal Court. Although Hamas is a non-state actor, Palestine has accepted the court's jurisdiction (Maguire, 2023).

As for Russia and Ukraine, since they are member states of the United Nations (UN), they are subject to the International Court of Justice (ICJ). Ukraine has already filed a lawsuit against Russia on the grounds of ongoing genocide. The action was granted and the Court established that the military advances should be stopped immediately, which did not happen, as can be seen from Braga's report (2022).

With regard to Vladimir Putin's situation at the International Criminal Court (ICC), as Russia is not a signatory to the Rome Statute, information that can be found

on the website Poder 360 (2023), in theory his responsibility would be obstructed before the Court in The Hague, given that war crimes, crimes against humanity, aggression and genocide can only be submitted to the jurisdiction of the ICC if they are perpetrated by a person who is part of a signatory state or a participant in a state that submits to the Court in some way, according to the Rome Statute: “The Court may exercise its powers and functions under this Statute in the territory of any State Party and, by special agreement, in the territory of any other State.” (Brazil, 2002).

Given the scenario presented, there is uncertainty about possible future liability.

5 CONCLUSION

Considering the trajectory outlined by this research, it was found that IHL is a fundamental pillar in the constant search to mitigate the suffering caused by conflicts not only to civilians, but also to combatants, in addition to regulating situations and pointing out locations that should not be affected due to their historicity and others that are of relevance to the population. The Geneva Conventions, their Protocols and the Hague Conventions, among many others, outline these protections.

However, despite having well-defined objectives and seeking to strengthen them internationally through treaties and promotions to reduce hostilities in war, the IHL faces many challenges in its application in disputes. The origins of conflicts, the actions of non-state actors, the limited interference of international authorities, among others, are obstacles to the effectiveness of this important system of international protection.

Given the scenarios described, it is clear that international society needs to prioritize the approaches of International Humanitarian Law, giving preference to promoting friendly solutions, as well as behaving in such a way as to respect the limits imposed because, even if the state is not a signatory to the aforementioned treaties, there are moral barriers.

Furthermore, holding violating agents accountable at the international level is due to existing obstacles, such as not adhering to treaties that stipulate responsibility for violations. To this end, it is necessary to develop mechanisms to assign responsibility to violating agents who evade it through non-adherence.

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