

DOES INTERNATIONAL HUMANITARIAN LAW SUBSTITUTE CHRISTIAN VALUES?

Brigadier Karl EDLINGER, Austria

Perhaps the best place to start is to describe what International Humanitarian Law (IHL) is all about. It begins with an idea that is simple but compelling: the idea that some things are not permitted even in wartime. The main idea is that there have to be limits to the violence that people inflict on one another. Using this idea as a starting point, international humanitarian law is composed of a number of rules. First of all there are rules, which shall protect people who have not or are no longer taking part in hostilities. Secondly there are rules restricting the means and methods of warfare.

International humanitarian law does not regulate whether a State may actually use force. This is governed by an important, but distinct, part of international law set out in the United Nations Charter. International humanitarian law aims first and foremost to limit the superfluous suffering that war can cause.

Many cultures have sought to limit the suffering that war can cause. International humanitarian law simply expresses the idea in legal terms. Again and again the question arises, where and how did IHL get its start? That is hard to pinpoint with any amount of precision. Some rules, which imposed restrictions on the conduct of war, the means of warfare, can be traced back to ancient civilizations and religions. Warfare has always been subject to certain principles and customs. The earliest known civilisation in the ancient Near East is Sumer, located in southern Mesopotamia. The Sumer civilization dates back to the 4th millennium BC. Among the inventions of the Sumerians, the most persistent and far-reaching was their invention of law. While all cultures had some system of social regulation, the law of the Sumerians was different. Their law was written and administered conflict management.

These Sumerians were constantly at war with one another and other peoples. But even wartime was not regarded as an extralegal period. The Sumerians were of the opinion that war as well was governed by law:

- War started with a declaration;
- War was subject to specific rules;
- War was terminated by a peace treaty.

At around 2000 BC, following the Sumerians, Semitic Amorites from west of the Euphrates River gained control over most of Mesopotamia.

The city of Babylon got leadership over Mesopotamia by its ruler, Hammurabi. He was a very

efficient ruler, writing an influential law code and giving the region stability after turbulent times. This set of rules, called Hammurabi's Code was the first written code of law in recorded history.

The structure of the code is very specific, with each offence receiving a specified punishment. The punishments tended to be harsh by modern standards, with many offences resulting in death or disfigurement, but this law provided essentially for the protection of the weak against the oppression by the strong.

In the 7th century B.C. Cyrus I, king of Persia succeeded to establish the largest empire the world had ever seen. The Empire under Cyrus' rule extended approximately from Turkey, Israel, and Armenia in the west to Kazakhstan, Kyrgyzstan, and to the Indus River in the east.

A new era began in the age of empire building. A huge superstate, comprising many dozens of countries, races, religions, and languages, were ruled under a single administration headed by a central government. This system lasted for centuries. Cyrus the Great is ranked among the 100 most influential figures in history. In 2003, Shirin Ebadi, an Iranian lawyer and human rights activist, evoked Cyrus in her acceptance of the Nobel Peace Prize, saying: *"I am an Iranian, a descendant of Cyrus the Great. This emperor proclaimed at the pinnacle of power 2,500 years ago that he 'would not reign over the people if they did not wish it.' He promised not to force any person to change his religion and faith and guaranteed freedom for all. The Charter of Cyrus the Great should be studied in the history of human rights."*

Cyrus the Great was distinguished equally as a statesman and as a soldier. By pursuing a policy of generosity instead of repression, and by favouring local religions, he was able to make his newly conquered subjects into enthusiastic supporters. As military leader he ordered the wounded enemy soldiers to be treated like his own soldiers. This principle of non-discrimination is a basic principle of contemporary humanitarian law.

The Islam also acknowledged essential requirements of humanity. Abu Bakr, who was a companion of Mohammed and the first Muslim ruler after him, stipulated, for instance, the following: *"The blood of women, children and old people shall not stain your victory. Do not destroy a palm-tree, nor burn houses and cornfields with fire, and do not cut any fruitful tree. You must not slay any flock or herds, save for your subsistence."* That is an excellent example for humanitarian directives to military leaders but in many cases Islamic warfare was not less cruel than warfare by Christians. Under the reign of leaders like Sultan Saladin in the 12th century, however, the laws of war were observed in an exemplary manner. Sultan Saladin fighting against Christian crusaders ordered the wounded of both sides to be treated outside Jerusalem and allowed the members of the Order of St. John to discharge their hospital duties.

The Mahabharata is the most famous Sanskrit epic of ancient India. With more than 74,000 verses and some 1.8 million words in total, it is one of the longest epic poems in the world.

It is of immense importance in the culture of India and Nepal, and is a major text of Hinduism. The epic deals with human goals (wealth, pleasure, duty/harmony and liberation) and attempts to explain the relationship of the individual to the society and the world.

This Indian epic already contains provisions which

- prohibit the killing of an adversary, who is no longer capable of fighting and surrenders,
- forbid the use of certain means of combat, such as poisoned or burning arrows, and
- provide for the protection of enemy property and prisoners of war.

The Greeks, in the wars between the Greek city-states considered each other as having equal rights. They respected life and personal dignity of war victims as a basic principle and exchanged prisoners of war. They respected restrictions of warfare (e.g. the poisoning of wells was forbidden). They spared temples, embassies, priests and envoys of the opposite side.

In the middle Ages, conflicts and wars were governed by strict principles. Augustine of Hippo or Saint Augustine was one of the most important figures in the development of Western Christianity. He is considered to be one of the church fathers. The principle of protecting women, children and the aged from hostilities originated from him. The enforcement of respect for holy places created a right of refuge. The church carefully monitored the observance of this right of asylum in churches. This is just one out of many instances for Christian influence to Humanitarian Law.

The middle Ages were also formed by knighthood. The knights fought against each other according to certain unwritten rules. Tribunals of knights variously enforced the rules of arms. These rules applied only to knights, but not to ordinary people. The enemy was frequently regarded as an equal combatant who was to be defeated in an honourable fight. It was forbidden to start a war without prior notification.

As a result of the decline of knighthood, the invention of firearms and, above all, the creation of armies consisting of mercenaries, the morals of war coarsened again towards the end of the middle Ages.

Considerations of chivalry were unknown to these armies. Equally, they did not make any distinction between combatants and the civilian population. Mercenaries regarded war as business, which they carried on for the purpose of private gain.

At the beginning of modern times, the wars of religion, and particularly the Thirty Years' War, once again led to the most inhuman methods of warfare. The cruelties of these wars essentially contributed to the fact that lawyers focussed on the *ius in bello* and established a number of dictates which were to be observed by the belligerents. In his work "De iure belli ac pacis", which was published in 1625, Hugo Grotius, the father of modern international law, pointed out existing rules to the conduct of war.

A fundamental change in the attitude of states to the conduct of war did not come until the beginning of the age of Enlightenment in the 18th century. In 1772, Jean-Jacques Rousseau made the following statement in his work "Le contrat social": *"War is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers, not as members of their country, but as its defenders. The object of the war being the destruction of the hostile State, the other side has the right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they become once more merely men, whose life no one has any right to take."*

The next important milestone in the history of Humanitarian Law was the Battle of Solferino. The Battle of Solferino took place on 24 June 1859 and was a decisive engagement in the Second Italian War of Independence. The battle took place near the village of Solferino, a location in the Lombardy between Milan and Verona. The Battle of Solferino was fought between the allied French Army under Napoleon III and Sardinian Army under Victor Emmanuel II against the Austrian Army under Emperor Franz Joseph. More than 200,000 soldiers fought in this important battle. There were a combined total of 118,600 French and allied Sardinian troops and about 100,000 Austrian troops. The confrontation was between the Austrians, marching across northern Italy, and the French and Sardinian forces that opposed their advance. The battle was a particularly gruelling one, lasting over nine hours and resulting in over 3,000 Austrian troops killed with 10,807 wounded and 8,638 missing or captured. The Allied armies also suffered a total of 2,492 killed, 12,512 wounded and 2,922 captured or missing. In the end, the Austrian forces were forced to yield their positions, and the Allied French-Italian armies won a tactical, but costly, victory.

This battle had a long-term effect on the future conduct of military actions. Jean-Henri Dunant, a Swiss businessman working for a bank in Geneva was responsible for the construction of a wheat mill in Tunisia. Because he was not able to obtain the land concession that was necessary for the operation he decided to approach Napoleon III himself to obtain the business document he needed. This was how he came to be present at the end of the battle of Solferino. Dunant was shocked by the horrific suffering of wounded soldiers left on the battlefield and the lack of provisions for the care

of the wounded by the military.

He then organised volunteers to attend to the victims and launched an immediate relief campaign. After returning to Switzerland, he reported to the world what he had seen. He published "Souvenir of Solferino", a book that affected the conscience of Europe. In this book, he described his experiences and the insufficiencies of the armed forces' medical services. He suggested that aid societies be formed in every country during peacetime, and that their services to the victims of disasters be neutral.

In 1863, only four years after his trip to Solferino the International Committee for Relief to the Wounded was founded. Later on the Committee was called International Committee of the Red Cross (ICRC). One year later twelve nations signed a Convention prepared by the International Committee of the Red Cross called "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field". This first Geneva Convention provided for the neutrality, protection and respectful treatment of ambulances, field hospitals and medical personnel of the Red Cross. The Convention also authorised them to care for and nurse the wounded, irrespective of their nationality and of the side they had taken part during the hostilities.

In 1868 the Declaration of Petersburg was signed. This declaration was the first to introduce conventional limitations for the use of means of warfare. According to this Declaration the use of explosive bullets was forbidden. These bullets cause unnecessary suffering and this principle codified in 1868 is still valid today.

On the initiative of Czar Alexander II of Russia the delegates of 15 European States met in Brussels. The 1874 Brussels Declaration provided the first comprehensive code of the laws and customs of war. This Declaration was further developed at The Hague Peace Conferences of 1899 and 1907. The most important result was achieved in the Hague Regulations Respecting the Laws and Customs of War on Land. These regulations became International Customary Law and are therefore binding for all States.

These international conferences were the starting point of the contemporary Law of Armed Conflict. All of them dealt with practical aspects of war: the first, which protects the victims of armed conflicts, has become known as Geneva law; the second, which contains restrictions and prohibitions on the methods and means of warfare, is known as Hague law. The terms derive from the fact that the relevant treaties were drafted primarily in those cities.

Geneva law comprises the four Geneva Conventions drawn up in 1949 (and which supplemented the earlier Conventions of 1864, 1906 and 1929). They concentrate on protecting the victims of armed conflict:

- the 1st Geneva Convention protects the wounded and sick on land;
- the 2nd Geneva Convention protects the wounded, sick and shipwrecked at sea;

- the 3rd Geneva Convention deals with the status and treatment of prisoners of war;
- the 4th Geneva Convention protects civilians in times of war.

Hague law deals with the practical military aspects of the conduct of hostilities. For example, the Hague Regulations, first drafted in 1899 and amended in 1907, deal with the laws and customs of war on land, and the 1899 Hague Declaration on Expanding Bullets banned the use of such ammunition. Hague law covers in particular:

- the rights and duties of the belligerents in their conduct of operations;
- the limitations and prohibitions in the choice of methods and means of warfare;
- the rules regarding occupation and neutrality.

The law of armed conflict has undergone a process of dynamic change in recent years, as new provisions have been adopted to keep pace with the changing nature of conflicts. The new provisions often combine aspects of both Hague and Geneva law.

Some examples are:

- the 1954 Hague Convention on Cultural Property shall avoid the destruction of cultural significant sites during wartime. The Convention defines a protective sign to facilitate the identification of protected cultural property.
- the 1972 Biological Weapons Convention was the first multilateral disarmament treaty banning the production of an entire category of weapons. The Convention forbids in any circumstances to develop, produce, stockpile or otherwise acquire or retain biological weapons.
- the two 1977 Protocols additional to the Geneva Conventions, the first relating to international armed conflicts, the second to non-international armed conflicts supplements the four Geneva Conventions of 1949.
- the 1980 UN Conventional Weapons Convention seeks to prohibit or restrict the use of certain conventional weapons which are considered excessively injurious or that have indiscriminate effects. The Protocols of the Convention cover:
 - detectable fragments: prohibits the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays.
 - mines and booby traps (amended in 1996): prohibits the use of non-detectable anti-personnel mines and their transfer and the use of non-self-destructing and non-self-deactivating mines outside fenced and marked areas;
 - incendiary weapons: prohibits making the civilian population as such, individual civilians or civilian objects, the object of attack by any weapon which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame or heat;

- the prohibition of blinding laser weapons (adopted in 1996): prohibits the use of laser weapons specifically designed to cause permanent blindness.
- explosive remnants of war: regulates the clearance of AXO (abandoned explosive ordnance) and UXO (unexploded ordnance), such as unexploded fragments of cluster bombs.
- the 1993 Chemical Weapons Convention: outlaws the production, stockpiling and use of chemical weapons;
- the 1997 Ottawa Convention bans completely all anti-personnel landmines.
- the Third Protocol additional to the Geneva Conventions is an amendment to the Geneva Conventions relating to the Adoption of an Additional Distinctive Emblem.

THE BASIC PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

Just as military operations have principles of attack, defence, withdrawal, etc., so does the international humanitarian law contain a set of clearly defined principles. These principles are practical, reflect the realities of conflict and, most important of all, do not include anything that a professional soldier could not apply in battle. They strike a balance between humanity and military necessity and are valid at all times, in all places and under all circumstances. The basic principles are “distinction”, “proportionality”, “limitation”, “military necessity”, “good faith” and “human treatment and non-discrimination”. You will find the following principles throughout the law of armed conflict.

- **DISTINCTION**

You must always clearly distinguish between combatants and civilians or the civilian population as such. Combatants may of course be attacked unless they are out of action, i.e. they are *hors de combat*. Civilians are protected from attack but lose that protection whenever they take a direct part in hostilities for the time of their participation. Similarly, you must always distinguish between military objectives, which can be attacked and civilian objects, which must be respected.

- **PROPORTIONALITY**

When military objectives are attacked, civilians and civilian objects must be spared from incidental or collateral damage to the maximum extent possible. Incidental damage must not be excessive in relation to the direct and concrete military advantage you anticipate from your operations. Excessive use of force quite clearly violates the law of armed conflict.

- **LIMITATION**

In any armed conflict, the right of the parties involved to choose methods and means of warfare is not unlimited, i.e. IHL limits how weapons and military tactics may be used.

Weapons and tactics that are of a nature to cause unnecessary suffering or superfluous injury are prohibited. The purpose of the second sentence of this principle is to prohibit weapons which cause more suffering or injury than is necessary to put enemy combatants

out of action. It applies, for example, to weapons designed to cause injuries that are impossible to treat or that result in a cruel and lingering death.

- **MILITARY NECESSITY**

This principle is enshrined in the preamble to the 1864 St Petersburg Declaration, which states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy” and that “for this purpose it is sufficient to disable the greatest possible number of men”. This principle is entirely practical. It accepts the realities of battle. It allows the use of reasonable force to make the opponent submit.

Activities, which are clearly militarily unnecessary, are prohibited.

A soldier must never use military necessity as an excuse for slackness, indifference, poor planning or leadership. Military necessity is built into the law; it cannot be invoked to justify violations of the law.

- **GOOD FAITH**

Good faith between opponents is a customary principle of warfare. The military should show good faith in their interpretation of the law of armed conflict. Good faith must also be observed in negotiations between opponents and with humanitarian organizations.

- **HUMANE TREATMENT AND NON-DISCRIMINATION**

All people must be treated humanely and without discrimination based on sex, nationality, race, religion or political beliefs. Those who are out of action (*hors de combat*), such as surrendering combatants, the wounded, sick and shipwrecked, prisoners of war and other captives and detainees, must be identified as such and treated humanely.

SUMMARY

International Humanitarian Law was born on the battlefield. It is steeped in the traditions and customs of all cultures and is intended to reduce the suffering, loss and damage caused by war. IHL places obligations on persons in the States involved and lays down rules for the conduct of military operations, good practical rules with which soldiers are legally obliged to comply as members of the armed forces. It is also worth remembering that the law, if correctly applied, does not impede military efficiency but is there to help the military as well as the civilian victims of armed conflicts.

In course of time the humanitarian regulations applicable in armed conflicts became more and more specific and were fixed in international treaties, which are binding for a great number of states. Some regulations became international customary law and are therefore binding for all states, no matter if they ratified the treaty or not.

States are obliged to disseminate the content of international humanitarian law especially within their armed forces. Individuals who violate international humanitarian law may be prosecuted and sentenced by their own state but also by any other state which is a contracting power of a specific IHL treaty. One might come to the result, that all the international instruments covering humanitarian issues in armed conflicts may substitute the values, especially Christian values of individual soldiers.

Has the religious attitude of soldiers any influence to the conduct of hostilities? Who is more important for humanity in armed conflicts, the chaplains or the lawyers?

Let's focus on the means used by legal advisers and by chaplains or other religious personnel: on the one hand we have laws and on the other hand we deal with religious regulations or commandments. What do they have in common, what are the differences?

Both may be used as guidelines for behaviour, but the main difference is that laws may be enforced by public means. Who ever violates laws may be prosecuted by law enforcement organisations and may be sentenced by some kind of tribunal or court. The law is the basis for passing a sentence and executing a penalty. It makes no difference whether an individual respects the law because of personal conviction or because of the fact that he may be prosecuted. If not personal acceptance but fear from punishment is the main reason for the respect of laws, the enforcement system must be very efficient. If there is a good chance, not to be prosecuted, individuals more likely violate laws. Religious commandments are not enforced by public means. Violations do not end in prosecutions; violators are only subject to their own conscience.

So the conclusion may be:

- We need laws about the conduct of hostilities. Laws are the legal basis to enforce the desired behaviour and to prosecute those who commit undesired acts.
- We need Christian soldiers or individuals with a value system similar to ours to achieve acceptance for humanitarian law in armed conflicts. The fear from punishment may be sufficient in everyday situations. In unusual situations like armed conflicts it is absolutely necessary that soldiers and especially commanders not only fear punishment but accept humanitarian law as a guideline for the planning and the conduct of operations. This becomes even more important in so-called asymmetric warfare and in activities against terrorism.

We cannot do without Humanitarian Law, but Humanitarian Law never can substitute Christian values; Humanitarian Law and Christian values complement each other and contribute to limit the inhuman effects of armed conflicts.

ANNEX:**Case 1:**

What about an action which is in accordance with IHL but by a Christian soldier considered inconsistent with his values?

The situation is similar to abortion which is legitimate according to the national law of many countries but is nevertheless inconsistent to Christian values.

According to the principles of Humanitarian Law only military objectives may be attacked. Civilians and civilian objects must be spared from incidental or collateral damage to the maximum extent possible. Incidental damage must not be excessive in relation to the direct and concrete military advantage. The military leader has to evaluate the incidental damage and the military advantage, to balance them and to take a decision: e.g. he has to balance hundreds of civilian casualties with the delay of reserve forces (video clip!).

Case 2:

There is no doubt that armed conflicts are extraordinary situations. In many cases the situation is very unclear and it seems to be easy to find arguments to justify one's actions.

Movie clip!

Combatants may be attacked unless they are wounded and surrender. If they are wounded and continue to fight or try to escape they become legitimate targets again and may be attacked.

Case 3:

"What about a Christian soldier whose government waged a war which is not compatible with his Christian values?"

I want to remind you of the Austrian Franz Jägerstätter. As Hitler's troops moved into Austria in 1938 he was the only person in his village to vote against the accession. As he was called to active duty in 1943 he maintained his position against fighting for the Third Reich and was imprisoned. After a military trial he was beheaded in Berlin on August 9, 1943.

There were a lot of discussions about Franz Jägerstätter over the last 60 years. In June 2007 Pope Benedict XVI authorized the Congregation for the Causes of Saints to publish a decree that declares Jägerstätter a martyr. With its publication the process of beatification will be completed. The ceremony will take place on October 26, 2007 in Linz.