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**Paper : P-8 Human Rights in times of Armed Conflict**  
**Module : U-1 M-9 IMPLEMENTATION OF IHL**

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## IMPLEMENTATION OF IHL

### BRIEF OVERVIEW

This module deals with how international law and domestic law of various countries help in ensuring enforcement of the provisions of International Humanitarian Law. It also discusses the two-fold duty of the state parties towards the enforcement of the IHL. Further, the module discusses the results of breach of IHL and how the International Criminal Court treats it. Also, the module gives a brief overview on why various countries like India are not yet a member state of the Rome Statute of the International Criminal Court.

### OBJECTIVE

This module aims to develop an understanding about how the International Humanitarian law is enforced by the states and the International Criminal Court. It also briefly explains the readers about the role of the International Criminal Court with respect the International Humanitarian Law.

### INTRODUCTION

International humanitarian law was devised with war in mind, and with the aim of getting parties to a conflict to behave according to the rules applicable in such times.<sup>1</sup> Parties to a given humanitarian treaty have to comply with obligations arising out of that treaty, whereas all States have to respect provisions that are part of customary law. Indeed, States have to respect their international commitments and have to take all measures necessary to facilitate implementation of the law. If a party fails to do so, the State may be held responsible for a wrongful act.<sup>2</sup>

The obligation to respect and ensure respect for international humanitarian law is found in numerous military manuals. It is supported by the practice of international organisations and international conferences.

### BASIC INSTRUCTIONS OF IHL

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<sup>1</sup>Common Article 1 of Geneva Convention Revisited: Protecting collective interests  
<https://www.icrc.org/eng/resources/documents/misc/57jqcp.htm> last accessed on 3/16/15

<sup>2</sup>Human Rights Law <http://www.ijrcenter.org/human-rights-law/> last accessed on 3/16/15

The Geneva Conventions and the Additional Protocols require the States party to adopt a number of measures in order to assure compliance with these treaties. Some of these measures have to be taken in peacetime, others in the course of an armed conflict. In this short overview, only three such obligations will be mentioned, as examples:

1. -Instruction to and training of the armed forces: The rules of IHL have to be taught to those who have to comply with the rules. It should be ensured that the personals in the armed forces are aware of the rules of IHL and will take appropriate steps to ensure the implementation of the laws of war.
2. -Domestic legislation on implementation: Many provisions of the Geneva Conventions and their Additional Protocols imperatively require each State Party to enact laws and issue other regulations to guarantee full implementation of its international obligations.
3. -Prosecution of person who has committed grave humanitarian breach: Any State party under whose authority they find themselves must prosecute such persons. That State may, however, extradite the suspect to another State Party that is willing to prosecute him. Individuals' accused of violating humanitarian law may also be tried by an international criminal court.

The duty of the state to enforce and respect the International Humanitarian law has been stated in the Geneva Convention as well as additional protocols. The military manuals of various states add up to this duty and ensure further enforcement of the International Humanitarian Law. Therefore the military manuals of the state and the provisions of the International humanitarian law helps in implementation of the International humanitarian law.

## **RULES OF IHL**

Article 1 common to the four Geneva Convention reads, "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." The obligation to respect and ensure respect applies to international conflicts and, indeed, to non-international conflicts to the extent that the latter are covered by common Article 3.

The duty of the parties is two-fold.

1. 'To respect'- State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs as well as by all others under its jurisdiction.<sup>3</sup>

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<sup>3</sup>Common Article 1 of Geneva Convention Revisited: Protecting collective interests  
<https://www.icrc.org/eng/resources/documents/misc/57jqcp.htm> last accessed on 3/16/15.

2. 'To ensure respect'- States, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict. ICRC as an institution plays a major role in the implementation of the IHL.



The article makes it an obligation to follow the rules of IHL by mentioning that high contracting parties have to follow the rules 'in all circumstances' making it an obligation for the parties. Over the last half century the practice of States and international organizations, buttressed by jurisprudential findings and doctrinal opinions, clearly supports the interpretation of common Article 1 as a rule that compels all States, whether or not parties to a conflict, not only to take active part in ensuring compliance with rules of international humanitarian law by all concerned but also to react against violations of that law. It is now widely accepted that the obligation contained in common Article 1 is binding on all States and competent international organisations.<sup>4</sup> Common Article 1 clearly indicates that the State is under an obligation to do everything it can to ensure that the rules of international humanitarian law are respected both by its organs and by other entities under its jurisdiction.<sup>5</sup>

Customary International Law refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties. According to Article 38(1) (b) of the ICJ Statute, customary international law is one of the sources of international law. The customary law can be established by showing (1) state practice and (2) *opinion juris*<sup>6</sup>.

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<sup>4</sup>*I.d.*

<sup>5</sup>*I.d.*

<sup>6</sup>Customary International Law [http://www.law.cornell.edu/wex/customary\\_international\\_law](http://www.law.cornell.edu/wex/customary_international_law) last accessed on 3/16/15.

Customary International Law has listed several rules to be followed by the parties to the armed conflict. Some of the rules regarding implementation are as follows-

Rule 139- Each party to the International Humanitarian law must respect and ensure respect by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.

Rule 142- States and parties to the conflict must provide instruction in international humanitarian law to their armed forces.

#### Military Manuals of States

Apart from the rules set by IHL, the military manuals of various nations also assist in the enforcement of the international humanitarian law.

U.S. Army Field Manual: The US Field Manual (1956) states: “The treaty provisions quoted herein will be strictly observed and enforced by United States forces without taking into consideration to whether they are legally binding upon this country.” It adds: “The unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces.”<sup>7</sup>The US Naval Handbook (2007) states:

*It is the policy of the United States to apply the law of armed conflict to all circumstances in which the armed forces of the United States are engaged in combat operations, regardless of whether such hostilities are declared or otherwise designated as “war”. The law of armed conflict as embodied in customary international law and all treaties to which the United States is a party binds to U.S. service members.*

Germany military manual: Germany’s Military Manual (1992) provides: “The members of the Federal Armed Forces are obliged to comply and ensure compliance with all treaties of international humanitarian law binding upon the Federal Republic of Germany.” The manual further states: It shall be a natural duty for a member of the Federal Armed Forces to follow the rules of international humanitarian law. With whatever means wars are being conducted, the soldier will always be obliged to respect and observe the rules of international law and take them as a basis for his actions

#### NONCOMPLIANCE WITH INSTRUCTIONS

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<sup>7</sup>Practice relating to Rule 139. Respect for International Humanitarian Law [https://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule139](https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule139) last accessed on 3/16/15.

International Humanitarian law is the customary and treaty-based positive international law which acts to limit the means and methods of warfare and to protect the victims of armed conflicts. IHL thus becomes the sole rescuer of the human rights in times of armed conflicts. Breaches of this international humanitarian law constitute war crimes, which can be prosecuted by the sovereign states.<sup>8</sup> The international criminal tribunal following the international criminal law can also try these crimes. So the breach of international humanitarian law precedes the international criminal law coming into action.

Breaches of the provisions of International humanitarian law can be encapsulated in the following ways-

Grave Breaches are those violations of the Geneva Conventions that are considered especially egregious and are considered to be of such 'gravity and magnitude that they warrant their universal prosecution and repression.' Grave breaches are crimes committed against those persons and objects designated by the Conventions as specially protected. These include persons hors de combat, the wounded, sick or shipwrecked, prisoners of war, and civilians subject to the territorial control of the Detaining Power or under the belligerent occupation of an occupying power. Objects protected under the Conventions include medical transports and medical units, non-defended localities and demilitarised zones, and objects of cultural, historical or spiritual importance<sup>9</sup>. Such offences are perceived as attacks on the international order.<sup>10</sup>

War Crimes are the violation of IHL that include grave breaches but are not limited to them only. War crimes are acts and omissions that violate international humanitarian law and are criminalised in international criminal law.<sup>11</sup>

Crimes against humanity/Genocide- Crimes against humanity are understood as crimes committed systematically, in accordance with an agreed plan, by either a State or organised group. It can be committed at the time of peace or war. Acts such as killing members of a group; causing serious bodily harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and/or forcibly transferring children of the group to another group; with the intent of annihilating the group altogether. Like crimes against humanity, a connection to an armed conflict is no longer necessary for acts of genocide to be made out.

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<sup>8</sup>Hortensia D. T. &Guttierrez Posse, 'The relationship between international humanitarian law and international criminal tribunals', International Review of the Red Cross, Volume 88, No. 861.

<sup>9</sup> Art 85, Geneva Convention

<sup>11</sup> Marko Divag Oberg, 'The absorption of grave breaches into war crime laws', International Review of the Red Cross, Volume 91, March 2009.



Figure 1: The cartoon indicates how Israel had been ignorant about the war crimes committed by it.

While the Conventions and Protocols do not provide for the concept of war crimes or grave breaches in non-international armed conflicts, customary international law has developed over the last few years to acknowledge that violations of Common Article 3 and some violations of Protocol II do indeed amount to war crimes – the Rome Statute of the International Criminal Court (ICC) includes non-international armed conflicts within its ambit, making violations of Common Article 3 of the Geneva Conventions and Protocol II a war crime.

Who files the case in case of breach:-

+ State – In the Israel-Palestine conflict, the state of Palestine is to lodge their first complaint against Israel for the alleged war crimes committed by them.

+International or mixed tribunal- In November 2011, after two years of investigation by the Kuala Lumpur War Crimes Tribunal, or KWLCT, a unanimous verdict found George W. Bush and Tony Blair guilty of crimes against peace, crimes against humanity and genocide as roles of their role in Iraq war.<sup>12</sup>

+Armed group

DOMESTIC LAW vs. INTERNATIONAL LAW

<sup>12</sup>'Lawsuit against Bush and Blaire for warcrimes' <http://www.globalresearch.ca/lawsuit-against-bush-and-blair-for-war-crimes-international-lawyers-seek-justice-for-iraqis/5378991> last accessed on 3/16/15.

LOAC comes from both customary international law and treaties. Customary international law, based on practice that nations have come to accept as legally required, establishes the traditional rules that govern the conduct of military operations in armed conflict

## CASE STUDIES

Sierra Leone ex-president Charles Taylor was convicted of committing 11 counts of war crimes which included terrorism, rape, murder, using child soldier etc. during the Sierra Leone war between 1997-2003. He was found guilty of abetting the crimes in the country by supporting the actions of Revolutionary United Front (RUF) and aiding to them. Taylor was sentenced to 50 years in jail in May last year, and the Special Court for Sierra Leone.<sup>13</sup>

Saddam Hussein was the fifth president of Iraq serving from 1979 to 2003. While in power, he controlled the industries and banks of the country. Saddam Hussein's is the only government ever to use lethal chemical weapons against its own citizens; it did so as part of a long-term campaign against the Kurds, in which some four thousand of their villages were completely destroyed, many toward the end of the Iraq-Iran War in 1987–1988. The government also carried out heavy and indiscriminate retaliation against Shiite communities that took part in the March 1991 uprising at the close of the Gulf War, including attacks on their holiest sites and their hospitals.<sup>14</sup> In 2003, a coalition led by the U.S. and U.K. invaded Iraq to depose Saddam, in which U.S. President George W. Bush and British Prime Minister Tony Blair accused him of possessing weapons of mass destruction and having ties to al-Qaeda by the Interim Iraqi Government for crimes against humanity. The Coalition Provisional Authority voted to create the Iraqi Special Tribunal (IST), consisting of five Iraqi judges, on 9 December 2003, to try Saddam Hussein and his aides for charges of war crimes, crimes against humanity, and genocide. He was executed by hanging in 2003.

Omar al Bashir came to power in Sudan through a coup in 1989. His coming to power was followed by the intense between the north and southern part of the country. This led to the death of over two million people and left over four million people displaced. Years of abuses by the government military forces and militia set a stage for genocide in Darfur. In 2008, the International Criminal Court alleged that Bashir was criminally responsible for individual charges like genocide, crimes against humanity and war crimes committed in Darfur. There have been charges of ethnic cleansing of the Fur, Masalit and Zaghawa tribes of Sudan. Various warrants have been served to Bashir, but Sudan has refused to

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<sup>13</sup>Matt Corley, 'Warlord Charles Taylor to serve 50 year sentence for Sierra Leone war crimes in British jail', Mail Online. <http://www.dailymail.co.uk/news/article-2451719/Charles-Taylor-sentenced-50-years-Sierra-Leone-war-crimes.html#ixzz3G9wP6CSb> last assessed on 3/16/15.

<sup>14</sup>'Putting Saddam Hussein on Trial' <http://www.nybooks.com/articles/archives/1993/sep/23/putting-saddam-hussein-on-trial/> last assessed on 3/16/15.

comply with them since it's not a state party to the Rome statute which led to the establishment of ICC. Bashir is the first sitting head of state to be indicted by ICC.

## THE ICC DEBATE

The current system of international criminal law works through international *ad hoc* tribunals internationalised or mixed tribunals, the International Criminal Court as well as national courts (military tribunals and ordinary courts). One of the legal consequences of framing an act as an international crime is that it may give rise to what is called universal jurisdiction, which allows any state to try alleged perpetrators, even in the absence of any link between the accused and the state exercising jurisdiction.<sup>15</sup>

The International Criminal Court was developed in 1990's after the huge popularity of the Yugoslavia and Rwanda tribunals. In 1998, the Rome Statute was concluded. In July of 2002, the Statute was ratified by enough state (60) to come into force, bringing the Court into operation. They became the first permanent international tribunal with jurisdiction over war crimes, crimes against humanity and genocide. The ICC can only try individuals, not states, for these crimes.



**Cour  
Pénale  
Internationale**

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**International  
Criminal  
Court**

The ICC, which began to operate in 2002, has the mandate to try cases involving war crimes, crimes against humanity, and genocide. The Court is intended to complement existing national judicial systems and can exercise its jurisdiction only if national courts are genuinely unwilling or unable to investigate or prosecute such crimes. (Article 17 of the *1998 Rome Statute of the ICC*<sup>16</sup>)

<sup>15</sup>'International Criminal Law' [http://www.geneva-academy.ch/RULAC/international\\_criminal\\_law.php](http://www.geneva-academy.ch/RULAC/international_criminal_law.php) last accessed on 3/16/15.

<sup>16</sup>*Id.*

ICC was established to curb the need of independent criminal court to resolve the issues in case of heinous crimes of international concerns. However, only 123 countries are state parties to the Rome Statute of International Criminal Court.<sup>17</sup> Asian countries like China, India, Sri Lanka etc. are not the state parties to the treaty. United States of America and Russia also have not accented to the treaty yet.

The fundamental principle of the Vienna convention of the law of treaties is that no state can be forced to accede to a treaty or be bound by the provisions of those treaties if it has not accepted it.<sup>18</sup> But the Rome Statute of International Criminal Court gives extraordinary power to the United Nations Security Council to bind the non-state parties to the convention. This means that in case of countries like India, even though it has not acceded to the convention, the ICC can take actions against it in case of any breach of the IHL laws if the Security Council feels that the breach is grave enough.

The primary objectives of India to the Rome statute are<sup>19</sup>-

1. Subordination of the ICC by the United Nations Security Council: United Nations Security Council has the power to refer the cases to the ICC and also to block ICC proceedings.
2. Powers of the individual prosecutor: India thinks that the statute has vested wide powers in the hands of an individual prosecutor to investigate and trigger jurisdiction.
3. Inclusion of nuclear weaponry and terrorism: India proposed the inclusion of nuclear weapon and terrorism as the crimes within the purview of ICC, but the proposal was rejected.

Thus even though India has not ratified to the provisions of ICC, it can be charged if the security council feels that India has committed any grave breach of the IHL laws.

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<sup>17</sup>*I.d.*

<sup>18</sup> Vienna Convention on the law of treaties, 1969.

<sup>19</sup>Tewari Garima, 'Why India continues to stay out of ICC', A CONTRARIO  
<<http://acontrarioicl.com/2013/04/27/why-india-continues-to-stay-out-of-icc/>>