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Paper : P-8 Human Rights in times of Armed Conflict
Module : U-1 M-5 Non-State Actors and IHL: Implementation, Violation and Accountability



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Description of Module	
Subject Name	Human Rights and Duties
Paper Name	Human Rights in times of Armed Conflict
Module Name/Title	Non-State Actors and IHL: Implementation, Violation and Accountability
Module Id	5
Pre-requisites	
Objectives	
Keywords	

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Module 5: Non-State Actors and IHL: Implementation, Violation and Accountability

Learning Outcomes

- This module will bring forth the implementation mechanism that facilitates its execution qua the Non-State Actors.
- The students will also learn about the conceptual foundations through which the applicability of IHL can be enforced on the Non-State actors.

Introduction

This module continues the exploration of the parallel frameworks of International Humanitarian Law (IHL) and International Human Rights Law (HRL), which share the basic similarity of their aim being protection of persons, but which also have different specific purposes and contexts. This module will aim to bring out key provisions and doctrines of both systems of law as applicable to non-state actors. Over and above this, the module will touch upon the methods of implementation of IHL. It will urge the reader to appreciate the binding force that IHL is intended to have. However, it will also attempt to critically acquaint the reader with the role of legitimized force in upholding principles of IHL. The module will achieve this end by educating the reader in strategies from humanitarian engagement with armed opposition groups

The module will first set out important treaty-based provisions and customary law principles that are applicable to state and non-state parties. The Module will also bring out the important theories of when IHL is applicable; including the *De Facto* Control Theory, situations when customary international law applies, the grave breach theory, and the legislative principle.

The module will then attempt to ground the difference made by IHL between combatants and civilians. Once this distinction is clear the essential concept of what is in furtherance of a military object will also be clarified to the reader by this module. In particular, this module will clarify what the Martens Clause is. The module will also introduce the Martens Clause as a principle of customary law.

Finally, the module will also bring out the intersection of international organizations such as the UN and the ICRC in the implementation of international law. It will move on to highlight how the UN has gotten more proactive in its approach to preserving the global order of IHL.

The overarching aim of the section is to give a brief overview of the content of IHL and the method of implementation. The module will also aim to give a bird's eye view of the possible route of evolution for the subject matter of IHL.

The Applicability of IHL and HRL to Non-State Actors

At the outset, to understand this module it is important to be able to identify the distinction between state actors and non-state actors and the rationale behind the applicability of IHL norms and HRL norms. It is worth reviewing here the definitions of “*civilians*” and the principle of distinction between combatants and civilians.

The definitions are taken from the ICRC's study on Customary International Humanitarian Law, which we will discuss in more detail later¹:

- Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.²
- Civilians are protected against attack, unless and for such time as they take direct part in hostilities.
- Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

¹See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), CUSTOMARY INTERNATIONAL HUMANITARIAN LAW – VOLUME 1: RULES, Cambridge University Press, Cambridge, 2005, (hereinafter “CUSTOMARY IHL 1”) online at: <https://www.icrc.org/customary-ihl/eng/docs/home>

² CUSTOMARY IHL 1, online at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5

- Civilian objects are all objects that are not military objectives.
- Civilian objects are protected against attack, unless and for such time as they are military objectives.

As a reminder, HRL is directed primarily at states (albeit for the protection of individuals), while the applicability of IHL to states is of a different kind. IHL provides protection from not states but those involved as participants in armed conflicts or non-state actors: these include combatants, or parties to a conflict, rather than only High Contracting Parties to the treaties, which are understood to be States. In both bodies of law, according to more general principles of attribution, the acts of individuals may be attributable to states.

Other definitions are relevant:

- a) **State Actors or High Contracting Parties:** State actors or High Contracting Parties to the Geneva Conventions refer to states that have signed and ratified the Geneva Conventions. It means that the states agree to be bound and governed by the Geneva Conventions during an armed conflict, of an internal or international character, happening within their respective territory.
- b) **Non-State Actors:** Non-state actors refer to armed rebel groups, civilian combatants or peacekeeping force within the territory of the High Contracting Party. Generally, while characterizing a group as a non-state actor, it is important to show the absence of or the involvement of the state or High Contracting Party in the command, control or operation of the group.

Applicability of IHL to non-state armed groups remains somewhat elusive. Different explanations of why such groups are bound by those conventions, in spite of their not having signed up to them, have been offered, none of them being fully satisfactory.

Possible Justifications for the Binding effect of IHL on Armed Non-State Actors

1. **Legislative Principle** non-State actors are bound by IHL by reason of their being active on the territory of a Contracting Party (a State Party to the Geneva Conventions and/or its Additional Protocols). This theory is also referred to as the 'principle of legislative jurisdiction', pursuant

to which the agreements which a State enters into are automatically binding on all (non-State) actors within its jurisdiction.³

Limitation: This theory fails because it uses as its basis the representative character of state decisions, and the presumption of consent by all of its subjects: “In reality, there are no groups that feel less represented by the State than armed opposition groups.”⁴ The theory binds those groups by IHL without their consent,

2. **Grave Breaches Theory:** in the field of international criminal law criminal responsibility attaches irrespective of the capacity of the<<>> There is indeed no denying that some more serious violations of international humanitarian law qualify as grave breaches or international crimes to which international criminal responsibility attaches.

Limitation: This responsibility is individual and not collective, however. There are no indications that entities, such as armed opposition groups, incur, qua entities (i.e., separate from their constituent members) international criminal responsibility for violations of IHL. Article 25 of the ICC Statute (referring to natural persons); Article 6 of the Charter of the International Military Tribunal (Nuremberg Charter) (referring to ‘individuals’ and ‘members of organizations’).

3. **De Facto Control Theory:** It can be argued that because some armed groups exercise de facto control over territory, they behave like States, international obligations usually binding on states should also be incurred by those armed groups.

Limitation: Even if this is accepted for some armed groups who meet this criteria, as not all of them exercise territorial control. It is not a general theory.

³ S. Sivakumaran, *Binding Armed Opposition Groups*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 369, 381 (2006);

⁴ Cedric Ryngaert, *Non-State Actors and International Humanitarian Law*, Institute for International Law, Working Paper (2008). <http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP146e.pdf>

4. **Customary International Law:** The final way to circumvent the consent problem is drawing upon a classical approach. Whereas in International Law, treaties are based primarily on consent of parties for their binding force, the other major source of international law Customary International Law is not about consent, but an accumulation of practice demonstrating the acceptance of a binding effect on the community as a whole.

Limitation: In the end, though even custom is only attenuated demonstration of consent, at least by the parties who have demonstrated a practice. Willingness to comply on the part of an actor is crucially dependent on the perception of its having consented to, or at least of having participated in the formation of the law one is bound by. Also, they have to be accepted as the kinds of actors who can create the kind of practice other international actors, including states, would agree to be bound by.

Customary IHL

In circumstances where the High Contracting Parties are not signatories to the Geneva Conventions, minimum customary international law is applicable. Customary international law is applicable because, it is universal law and has to be followed at all times.

The foundation of humanitarian law principles through custom is contained in the Martens Clause, named after the Russian delegate to the 1899 Hague Peace Conference. The clause states that:

In cases not covered by [this] or other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanitarian law, and from the dictates of public conscience.⁵

The next logical question is, what principles of humanitarian law would constitute customary international law? Jean-Marie Henckaerts, enumerates the customary rules of implementation, or

⁵ The Clause first appears in Article 23(e) of the Hague Conventions No. II of 1899, and then subsequently in the Hague Convention No. IV of 1907, as well as in many of the Geneva Conventions and Additional Protocols. The language changes slightly but these main ideas remain constant.

ensuring compliance with IHL. Rules 139-149 cover implementation as well as state responsibility. (IAC indicates applicability in international armed conflicts; NIAC indicates applicability to non-international armed conflicts, wherein typically at least one party is a armed non-state actor):

Rule 139. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. [IAC/NIAC]

Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity. [IAC/NIAC]

Rule 141. Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law. [IAC/NIAC]

Rule 142. States and parties to the conflict must provide instruction in international humanitarian law to their armed forces. [IAC/NIAC]

]Rule 143. States must encourage the teaching of international humanitarian law to the civilian population. [IAC/NIAC]

Rule 144. States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law. [IAC/NIAC]

Rule 145. Where not prohibited by international law, belligerent reprisals are subject to stringent conditions. [IAC]

Rule 146. Belligerent reprisals against persons protected by the Geneva Conventions are prohibited. [IAC]

Rule 147. Reprisals against objects protected under the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited. [IAC]

Rule 148. Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited. [NIAC]

Rule 149. A State is responsible for violations of international humanitarian law attributable to it, including: (a) violations committed by its organs, including its armed forces; (b) violations committed by persons or entities it empowered to exercise elements of governmental authority; (c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and (d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.[IAC/NIAC].

The Application of HRL to armed conflicts involving non-state actors faces very similar challenges in the application IHL norms to non-state actors. The text below focuses on different theories and limitations in the applicability of HRL to non-state actors.

Human Rights Law

International human rights law is applicable at all times, including in armed conflict. This has been formally confirmed on several occasions by the International Court of Justice. Thus, in contrast to international humanitarian law (IHL), there is no need to assess whether a certain threshold of violence has been reached (although certain situations of emergency may allow a State Party to

derogate from full observance of specific rights). When the threshold for the application of IHL has been reached, both bodies of law will generally apply in a 'complementary' way.

The applicability of human rights law to ANSAs is, however, controversial. One of the reasons put forward by scholars refuting the applicability of this body of law is that the rationale of human rights is the regulation of states' and not private actors' behavior with respect to individuals under their jurisdiction or control. Admittedly, in contrast with IHL instruments, few human rights treaties explicitly seek to bind ANSAs, although the situation is evolving. A narrow conception of human rights law does not, however, correspond to the basic philosophy of human rights or to the reality of many situations in which ANSAs operate.

As suggested by Andrew Clapham:

'[T]he most promising theoretical basis for human rights obligations for non-State actors is first, to remind ourselves the foundational basis of human rights is best explained as rights which belong to the individual in recognition of each person's dignity. The implication is that these natural rights should be respected by everyone and every entity.'⁶

From a technical point of view, there seems to be broad agreement among experts that international human rights law could be applicable to ANSAs in specific circumstances, in particular when they exercise elements of governmental functions and have de facto authority over a population. This will normally be the case when an armed group controls a certain portion of the territory. Indeed, the need to regulate the relationship between those who govern and those who are governed, which characterizes the *raison d'être* of human rights law, would be reproduced and thus would justify the application of that body of law.

We have seen international bodies active in the implementation and enforcement of IHL as well as HRL courts and tribunals taking up non-international armed conflicts and internal strife.⁷ Competing

⁶ Andrew Clapham, 'Human rights obligations of non-state actors in conflict situations', in *International Review of the Red Cross*, Vol. 88, No. 863, September 2006, pp. 491–523.

⁷ B.G. Ramcharin, *The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts*, 33 AM. U. L. REV. 99, 105 (1983).

claims of comprehensive legal frameworks can also impede their acceptance in part due to actual gaps and overlaps in their coverage.⁸ For example, thus far no unified treaty or body of customary international law has set forth a comprehensive framework for non-belligerent occupations and peace-building missions.

Strategies to gain the adherence of various groups to basic humanitarian standards must include a series of practical steps for all parties to ensure compliance with these standards. Such institutional options may take many forms, including unilateral declarations, negotiated solutions, and top-down directives, and all of these forms have been used to implement IHL in otherwise difficult situations. Some of these have been successful even where *de jure* applicability is less certain or not accepted by all parties.

1. Strategies for Humanitarian Engagement with Armed Opposition Groups

While the goal of implementation is to bind parties to international standards, a strategic question that follows is whether to build capacity or build pressure in engaging with various non-state actors.⁹ For the ICRC and traditional humanitarian actors, neutrality cannot be abandoned or qualified, but there is a continuum of coercion available to these groups. Certain methods have developed for promoting implementation of IHL by armed opposition groups. These strategies can be generalised somewhat to reach and enforce special agreements bringing into force provisions from the IHL of international armed conflicts. Their effectiveness can be seen in the inclusion of armed groups in humanitarian initiatives, including the Geneva Call supporting the Ottawa Treaty banning anti-personnel landmines.¹⁰

⁸ See Daniel Thürer, *The “Failed State” and International Law*, 836 INT’L REV. RED CROSS 731 (1999).

⁹ Claude Bruderlein, *The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars* (2000), http://www.humansecuritynetwork.org/docs/report_may2000_2-e.php.

¹⁰ Geneva Call is an international humanitarian organization dedicated to engaging armed non-State actors (NSAs) to respect and to adhere to humanitarian norms, starting with the ban on anti-personnel (AP) mines. Geneva Call is committed to the universal application of the principles of international humanitarian law and conducts its activities based on the principles of neutrality, impartiality and independence. Geneva Call “provides an innovative mechanism for NSAs, who do not participate in drafting treaties and thus may not feel bound by their obligations to express adherence to the norms embodied in the 1997 anti-personnel mine ban treaty (MBT) through their signature to the “Deed of Commitment for

According to Claude Bruderlein, implementation may involve either “engaging in a dialogue with these groups and assisting them in building their capacity to respect humanitarian and human rights norms” or “aiming at building pressure on these groups by shaming them in front of the international public and their own constituency for violations of international standards.”¹¹ The separation of these strategies brings to light two obstacles to implementation: incapacity and unwillingness. Both have to be assessed. Therefore, a careful analysis of the most promising path should be made at the outset.¹² Again, without certain mechanisms to follow-up and monitor a group's commitments, most of the provisions of humanitarian agreements cannot be effective, and the provisions will remain mere parchment barriers. In the interim, as with ceasefires and disarmament agreements, the adoption of IHL standards as confidence-building measures may also help facilitate communication, develop trust between parties to a conflict, and help repress violations.

2. U.N. Practice and Other Institutional Precedents

It is useful to look at the development of one of the key instruments extending “respect and ensure respect” in a juridical gap: the Secretary General’s Memorandum extending the application of IHL to peacekeeping operations. Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law. Remaining doubts about the applicability of international humanitarian law to the United Nations have been removed by the issuance of an administrative order by the Secretary-General.¹³

Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action" This document is archived at <http://www.genevacall.org/home.htm>.

¹¹ Bruderlein, *supra note* 10.

¹² Bruderlein, *supra note* 10 (“First, one must assess the main characteristics of the group to be approached and make a first determination of its cohesion to evaluate the opportunity to engage in a productive dialogue with the group. Although this determination may sometimes require preliminary contacts with the group, the aim is to develop a critical outlook on the merit of a dialogue with an armed group aside from the stance of its leadership on humanitarian issues. Once this preliminary determination has been made, plans to engage the group on a humanitarian dialogue should be elaborated, taking into account various factors influencing the group's receptivity to international standards.”).

¹³ The Secretary-General, Bulletin on the Observance by United Nations Forces of International Humanitarian Law, ¶ 1, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999).

Historians and legal advisors alike have had the opportunity to review the historical debate between the ICRC and UN over the question of the application of IHL to peace operations.¹⁴ These authorities seem to agree that there has been an evolution in the UN's position is agreed upon, but how one might characterise its accession to IHL is less certain.¹⁵ Since the 1950s, the applicability of IHL to UN forces has been doubted and even international lawyers suggested the UN should simply "select such of the laws of war as may seem to fit its purposes."¹⁶ As far back as the Korean conflict, the UN has argued that since it is composed of individual troop-contributing states (TCS), the organisation cannot take responsibility for applying IHL to their peacekeeping forces in peace operations. It remains uncertain that this instrumentalism has been transcended. Separately, it has argued that the organization as a whole must be seen to "act on behalf of the international community" and cannot be considered a "Party" or "power" within the meaning of the Geneva Conventions.¹⁷ The application of CA1 would be thwarted if neither the UN (as a non-state) nor a troop contributing state (if its troops are under UN "command and control" would be held responsible for violations of IHL).¹⁸ States involved in UN-authorized enforcement actions nevertheless remain bound by their individual obligations under the UN Charter, and this is particularly clear in actions authorized by the UN Security Council, but the scope of legal obligation is less clear if the Council deployed forces made available to it under Article 43 agreements. Finally, it has argued that UN peacekeeping forces must be viewed as impartial, objective and neutral (perhaps in a sense analogous to the ICRC) and cannot be subject to IHL in the conduct of their operations.¹⁹ Over the same period of time, the ICRC took the opposite view of applicability of IHL to UN forces in peace operations, though sometimes recognizing the same formal difficulties of applying the Geneva Conventions.²⁰

¹⁴ Christopher Greenwood, International and United Nations Peace Operations, 1 Yearbook of International Humanitarian Law 3-34 (1998);

¹⁵ *Id.* Greenwood

¹⁶ William J. Bivens et al., Should the Laws of War Apply to United Nations Enforcement Action?, 46 Am. Soc'y of Intl L. Proc. 216, 220 (1952). (This language comes from a 1952 committee of the American Society of International Law that expressed doubts about the applicability of IHL to UN forces).

¹⁷ See Greenwood *supra* note 15, at 18.

¹⁸ *Id.* Greenwood.

¹⁹ Daphna Shraga, Implications for Peacekeeping Operations, 2006 Conference to mark the Publication of the ICRC Study "Customary International Humanitarian Law" 126, available at [http://www.reliefweb.int/rw/lib.nsf/db900sid/MKOC775GXA/\\$file/Full_Report.pdf](http://www.reliefweb.int/rw/lib.nsf/db900sid/MKOC775GXA/$file/Full_Report.pdf).

²⁰ See *Id.* at 123-24.

Over the past two decades, several developments sidelined the legal debate over *de jure* provisions while promoting the convergence of a “pragmatic view,” according to

Daphna Shruga, Principal Legal Officer at the Office of Legal Affairs of the UN. First, in the 1990s, the UN began including a standard provision incorporated in Status of Forces Agreements concluded between the UN and host countries, stating that the “UN undertakes to ensure that the operations of the force will be conducted with full respect for the principles and spirit of the general conventions applicable to military personnel” studiously avoiding recognized terms in IHL, but naming the Geneva Convention and additional protocols as examples.²¹

This amounts to a complex mirroring exercise, where the UN translates IHL into its internal requirements, insist require TCS in their agreements that these should reflect these obligations, therefore reinforcing the state’s obligations to the general IHL. The UN, reflecting accurately the “principles and spirit” required of troops, remains a mirror, an illusory instrument avoiding questions of *de jure* application to the UN itself. It also avoids the issue of heterogeneity among TCS in their international obligations under the various treaties. Thus, even at the “principles and spirit” phase, the legal position did not waiver from the 1946 Convention on Privileges and Immunities of the United Nations and the 1994 Convention on the Safety and Security of United Nations and Associated Personnel, which cast the UN as immune to liability as the embodiment of the international community as a whole and characterized peacekeepers primarily as neutral and impartial observers to conflicts, though in the course of their duties they might find themselves as custodians of vaguely “military” standards when engaging in self-protection, detaining prisoners, or protecting civilians.²²

Conclusion

The section has highlighted, using broad strokes, the contemporary debates that surround IHL and HRL. IHL has traditionally distinguished between civilians and combatants and has attempted to protect the former during times of war. Its aim is really to make war just. While the HRL movement has traditionally been justified by arguing that its efficacy lies in protecting the citizens from a violation of their dignity and therefore operates against the state.

²¹ Daphna Shruga, *The United Nations as an Actor Bound by International Humanitarian law*, 5 INT’L PEACEKEEPING, 64 – 81 (1998).

²² Shruga, *supra note* 20 at 124.

In both cases, the question of when the law applies to non-state bodies has been posed consistently by scholars. There is a case for both IHL and HRL to apply to non-state actors; since their theoretical scope is wide enough to envisage such a scenario. Furthermore, it is also conceivable that both IHL and HRL can apply simultaneously, as advocated by the convergence thesis therefore, it is important for us to ask how both these systems of international governance are implicated in each other's success.

Finally, this Module has given a very basic introduction into the concept of implementation. If treaties and international law can't be implemented they lack the efficacy needed to make real change. However, with HRL and IHL, there is a system of governance, which is designed to help with implementation. We must appreciate how the UN and other related bodies are all implicated in this system of governance that is created by HRL (in particular) and IHL. The overarching question that this module poses, rather ominously it must be added, is this: Is this system of governance enough?

