

Pathshala
पाठशाला
A Gateway to All Post Graduate Courses

MHRD
Govt. of India

An MHRD Project under its National Mission on Education through ICT (NME-ICT)

Subject :
Human Rights and Duties

Production of Courseware
Content for **Post Graduate** Courses

Paper : P-8 Human Rights in times of Armed Conflict
Module : U-1 M-4 The Customary Principles of IHL and their Evolution (ICRC RULES)



Development Team

Principal Investigator: Prof. (Dr.) S.R. Murthy, Executive Director, Centre for Human Rights Studies, OP Jindal Global University

Paper Coordinator: Rohini Sen, Assistant Professor and Assistant Dean (International Collaborations), IGLS

Content Writer: Rohini Sen, Assistant Professor and Assistant Dean (International Collaborations), IGLS

Content Reviewer: Professor (Dr.) Gurjeet Singh, Professor and Dean, Faculty of Law, Guru Nanak Dev University, Punjab

Description of Module	
Subject Name	Human Rights and Duties
Paper Name	Human Rights in times of Armed Conflict
Module Name/Title	The Customary Principles of IHL and their Evolution (ICRC RULES)
Module Id	4
Pre-requisites	
Objectives	
Keywords	

 **Pathshala**
पाठशाला
A Gateway to All Post Graduate Courses

The Customary Principles of IHL and their Evolution (ICRC RULES)

1. Module Overview

This module will discuss the Customary principles of IHL as enumerated by the manual on customary international humanitarian law provided by the International Committee for Red Cross (ICRC). We will discuss in brief and principle the six major parts in which all the customary rules are divided in the study by ICRC.

2. Learning Outcomes

- To give students an overview of the major principles identified by ICRC customary rules.
- By the end of the module the students of a basic understanding of the concepts that have developed to the level of customary international law in the field of humanitarian law.

3. Introduction

The ICRC Customary IHL Rules is a study of customary international humanitarian law conducted by the International Committee for Red Cross and published by Cambridge University Press in 2005. It is considered to be one of the most authentic sources of interpretation and identification of principles of IHL and recognised by the international tribunals and countries alike as representing customary principles of humanitarian law. It consists of 161 rules divided into 44 chapters and six major parts. For every rule mentioned in the ICRC Customary IHL Rules, there is a corresponding chapter in the second volume of the publication i.e., ICRC Customary IHL Practice. The six major parts under which rules are divided include: The principle of distinction; specifically protected persons and objects; specific methods of warfare; use of weapons; treatment of civilians and persons *Hors de combat*; and then lastly the implementation.

4. Principle of Distinction

The first set of rules, and perhaps the most important customs are the rules relating to distinction. IHL requires a distinction to be maintained in the targets of the attack. The first distinction is that between civilians and combatants. Chapter 1 of the ICRC rules defines combatants, armed forces and civilians. Civilians ought not to be the targets of an attack. The second distinction is between Civilian Objects and Military objectives. Definitions of military objective and civilian objects are extremely vague, allowing a great scope of discussion on classification of objects. Certain objects clearly fall within military or civil objects, however, there are others such as dual use objects whose classification is not so black and white. A legitimate attack is one, which only targets a military objective. Chapter 3 of the customary rules prohibits indiscriminate attacks. Attacks that either do not, or cannot, make a distinction between its targets, and indiscriminately affects both civilian and military targets are considered indiscriminate. It is a generally accepted principle, as have been discussed in previous chapters too, that an attack has to be proportional to the military advantage it seeks to achieve. The last two chapters of the first part discuss the concept of precautions in attack and in effects of attack. As a part of precaution, constant care has to be observed belligerents to avoid or minimize incidental loss to life and civilian objects. They have a duty to verify their targets and if high incidental damage is anticipated due to an attack, belligerents have an obligation to cancel that attack. In addition to precautions in attacks, the belligerents have duty to ensure that their attacks are executed in a way to ensure minimum damage. They are required to choose targets away from population or removal of civilians in vicinity wherever possible.

5. Specifically Protected Persons and Objects

The second set of rules in the ICRC rules deal with protected persons and objects during an armed conflict. Quite obviously, the first ones on the list are medical personnel, medical activities, medical units, medical transports along with religious personnel and personnel displaying distinctive emblem. Objects and personnel involved in humanitarian relief and peacekeeping missions have protection under the customary rules too. An important protection under the ICRC rules is that of journalists. Journalists are very important for accessibility of the external world in the conflict zones, and therefore have been especially protected under the IHL rules. With respect to objects, the IHL rules protect hospitals and safety zones, demilitarised zones or non-defended areas. The belligerents have to be careful with what they choose to attack. Attacks on cultural property and places in order to damage the existing heritage, and natural environment are not allowed either.

6. Specific Methods of Warfare

There are certain methods that are prohibited to be used under an armed conflict situation. Using denial of quarter as a threat or attacking *Hors de Combat* or persons parachuting from aircrafts in distress is disallowed. *Hors de Combat* soldiers are those combatants of the adverse party, who are either defenceless due to unconsciousness, shipwreck, wounds, or sickness; or express intention to surrender and abstain from any hostile act and do not attempt to escape. Use of methods such as starvation or restricting access to humanitarian relief is absolutely prohibited under the customary rules. Activities such as pillage or taking war booty, or destruction or seizure of enemy property without a military objective are also considered to be restricted methods. The last set of methods which have been considered against honour in ancient times have developed to be a part of custom is

use of methods of deception. Methods such as improper use of white flag, improper use of distinctive emblems of Geneva conventions, improper use of UN or others international recognised emblems or uniforms, concluding agreements to suspend combat with the intention of attack or killing an adversary by resorting to perfidy are covered within the scope of these rules.

7. Use of Weapons

Perhaps the easiest categories of rules are that of use of weapons. As a general rule weapons that are of a nature that causes or likely to cause superfluous or unnecessary sufferings are prohibited. Weapons that are by nature indiscriminate, i.e., they cannot control the impact of the attack on the military objective. For example, attacks such chemical weapons that cause mass damage indiscriminately is prohibited under such weapons. Over the series of conventions, and now a part of the custom, weapons involving chemical weapons, poison, expanding bullets, exploding bullets on combatants, biological weapons, booby-traps, landmines, incendiary weapons, or blinding laser weapons are prohibited. It is quite interesting that nuclear weapons are absent from the list of prohibited weapons. Currently, there exists no customary law that prohibits the use or threat of use of nuclear weapons. The decision by the ICJ on the *Advisory opinion on Legality of the Threat or Use of Nuclear Weapons* has clarified that position. ICJ in its opinion explained that the use of nuclear weapons is not that clear or direct. If the weapon were of a nature that violates other principles of IHL, i.e., if it is indiscriminately in nature, it would still be prohibited under IHL. However, nuclear weapons if abiding by principles of IHL are not prohibited.

8. Treatment of Civilians and Persons Hors de Combat

Chapter 32 of the ICRC rules discusses the fundamental guarantees that international humanitarian law provides for. The first is that of humane treatment. All civilians and *Hors de Combat* are supposed to be treated humanely without discrimination of any kind. Activities such as murder, torture or inhumane treatment, mutilation and medical or biological experiments are strictly prohibited on the said group. Rape and sexual offences, or other types of offences such as slavery and slave trade, forced labour, hostage-taking and using human shields are also prohibited under the IHL rules. There are other set of rights relating to justice that is guaranteed to *hors de combat* and civilians. These guarantees include a prohibition against arbitrary deprivation of liberty, the prohibition against enforced disappearance, a guarantee of a fair trial, and respect for family life and religious practices amongst others. However, not all captured combatants have the same rights as prisoners of wars. For starters, combatants have the duty to distinguish themselves from civilians, if they do not do so, then they would not be considered prisoners of war. Combatants caught during espionage, i.e. spies, or mercenaries as defined by Geneva conventions do not have a status of prisoners of war. In cases of shipwrecks or conflict over sea, all parties to conflict have a duty to take all measures to collect and evacuate wounded, sick and shipwrecked without distinction, provide or allow them to obtain necessary medical care, and protect them from ill-treatment and pillage of personal property. The dead have to be collected, identified and cremated with respect and the remains and personal effects have to be returned.

Chapter 37 discusses the treatment of those deprived of their liberty. The parties to a conflict have a duty to provide basic amenities where such person are held and women and children must be held in separate quarters from men unless families are accommodated as family units. The prisoners have to be located at a place away from combat zone where their health and hygiene can be maintained. Personal details of the prisoners have to maintain and their personal effects have to be protected from pillage. In order to ensure that persons deprived of their liberty are in conditions prescribed by

IHL, ICRC must be granted regular access in cases of international armed conflicts and, may visit and offer services in a non-international armed conflict. All persons must be allowed to correspond with their families and those deprived of liberty for non-international armed conflict must be allowed to receive visitors. It also provides that personal convictions and religious practices of such prisoners must be respected.

Rule 128 lays down that PoW must be released after cessation of hostilities, civilian internees and persons deprived liberty in relation to non-international armed conflict, when reasons for their internment or deprivation ceases to exist. In addition, chapter 38 provides that, displacement of the population either from the occupied territory or from own territory to occupied territory is prohibited unless the security of population or military necessity so demands. In cases of displacement, parties have the duty to ensure they are received in good health and hygiene is maintained, and they have the right to return to their homes once the reason for displacement ceases to exist. Property rights of displaced persons have to be respected.

The last set of protection offered under the ICRC rules imposes a duty on parties to a conflict to respect special rights and needs of women, children, elderly and the disabled. It further creates an absolute prohibition on recruitment of child soldiers or allowing children to participate in hostilities.

9. Implementation

Compliance

The last section of the ICRC Rules deals with the implementation of the customary principles of international humanitarian law. It sets down obligations for each party to comply with customary rules irrespective of the reciprocity. States have an obligation to train their military commanders and armed forces about principles of humanitarian law. For the enforcement of the rules, states are required to exert their influence to the degree possible to stop violations. In the absence of provisions, of international law, belligerent reprisals are subject to stringent conditions. Any reprisals against persons or objects protected under Geneva conventions are prohibited. Further, the right to resort to belligerent reprisals is only available to parties to international armed conflicts.

State Responsibility

Customary rules of IHL also define the attribution of responsibilities. Rule 149 expresses that a state is responsible for violations of IHL including violations committed by: its organs, including armed forces; persons or entity empowered to exercise governmental authority; persons or group in fact acting on its instructions or under its direction or control; and of private person or groups of which it acknowledges and adopts as its own conduct. A state responsible for violations of IHL is required to make full reparations for the loss or injury caused. Reparation for the injury shall be in the form of restitution, compensation or satisfaction, or combinations of these principles. Restitution means reestablishing the situation that existed before the wrong was committed. Compensation, as a long-standing rule of customary law is clear, states that violate IHL must pay compensation if required. Satisfaction is required if the violation cannot be made good by restitution or compensation.

Satisfaction can include acknowledgement of the breach, expression of regret, formal apology or other such form of modality.

Individual Responsibility

Individuals are also criminally responsible for war crimes they commit. For that matter, individuals are only responsible for committing the crime, but also for assisting in, facilitating, aiding, or abetting the commission of a war crime or even it's planning. Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders or if they know, or had the reason to know, that subordinations were, about to be, committing these crimes and did not take measures to prevent them. Subordinates have a duty to disobey an unlawful order and the excuse of following orders does not discharge them of their criminal liability.

War Crimes

Serious violations of international humanitarian law constitute war crimes. The commentary to the ICRC Customary IHL rules expands the definition of war crime to deduce what does it actually mean by one. Analyzing the treaties and national legislations, it can be interpreted that if a violation endangers protected persons or objects, or if they breach important values, they would be considered serious. It was laid down in the *Tadic case* that the violations of rule of humanitarian laws must entail criminal responsibility for the individuals involved. War crimes list a lot of crimes. The first set of crimes included in definition of war crimes is that of grave breaches of Geneva Conventions against any protected person or property which include: willful killing, torture or inhumane treatment, willfully causing great or serious injury, extensive destruction or appropriation of property not justified by military necessity, compelling a PoW or other protected person to serve forces of hostile power, willfully denying PoW rights of fair trial, unlawful confinement, and taking of hostages.

A look at the Rome Statute of the International Criminal Court would identify a long list of other serious violations during international and non-international armed conflicts as war crimes. This one section would not be enough to list all crimes that could fall within a definition of a war crime.

An interesting concept of customary law that has developed with war crimes is that of universal jurisdiction of states over war crimes. Essentially what this means is, that any state irrespective of territorial jurisdiction can prosecute war crimes occurring in any part of the world, in their national courts, because the crime is of such a nature that it affects the whole world. States whose nationals commit the crime, or on whose territory the crimes occur, have the obligation to investigate the crimes and prosecute the suspects. Rule 159 also codifies that after the end of hostilities states must offer greatest possible amnesty to persons participating in non-international armed conflict, if the suspect is not accused of war crimes.

Additionally, given the nature of war crimes, it is not treated as any other crimes. The statute of limitation, for instance, does not apply to war crimes. Further, states have a duty to cooperate in order to facilitate investigation of the war crimes and prosecutions of the guilty.

10. Summary

In this module, we went through a summary of all the provisions enlisted in the ICRC manual on the customary international humanitarian law. First and foremost we discussed the principle of distinction and its related rules of proportionality and precautions, which work together for an act to be legitimate or illegitimate. We understood the difference between legitimate and illegitimate, military and civilian targets. We then discussed the protected objects and persons under the customary IHL rules. Following an introduction, we discussed the methods of warfare that are prohibited under the IHL principles, which include attacking defenseless, pillage, inhumane treatment, starvation as a method and deception amongst others. We discovered that weapons,

which cause excessive or superfluous injury, or are indiscriminate in their nature, are prohibited under principles of IHL. Customary rules provide a list of weapons that are prohibited so far, however, nuclear weapons are not yet a part of the list. We then shifted our attention to treatment of civilians and *hors de combat*. We discussed the fundamental guarantees offered to the entire group. We also discovered that certain categories of combatants do not get the status of prisoners of war, these include combatants who do not distinguish them from civilians, spies and mercenaries. We discussed the treatments and rights of detained prisoners and civilians deprived of their liberty, and duties and responsibilities of the parties to convention towards them. Lastly, we discussed the customary rules of IHL, which comprise on the implementation of the principles of IHL. These include mechanisms including requiring compliance followed by stricter mechanisms that result in state responsibility and individual criminal responsibility. We ended the chapter with an understanding about the definition, scope and implications of crimes that constitute as war crimes.

