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CUSTOMARY INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS IN ARMED CONFLICTS

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Abstract

International law is derived from both treaty law and customary international law. Treaties are formal written agreements among States that establish specific rules. On the other hand, customary international law is not codified in written form but is based on "a general practice accepted as law". It must be shown that a norm is reflected in state practice and that the international community views it as legally binding in order to prove that it is customary. Rules derived from "a general practice accepted as law" make up customary international law, which exists apart from treaty law. Customary international humanitarian law (IHL) is essential in contemporary armed conflicts because it fills in the legal gaps left by treaty law in both international and non-international conflicts and improves the protections provided to victims.

Key words: *customs; international humanitarian law; conflicts; human rights; states.*

INTRODUCTION

The primary sources of international law are regarded as formal. They originate from formal entities such as laws, customs, and treaties. The ICJ statute's Article 38(1)(a-c) is generally acknowledged as the foundation of the formal

source of international law. Its assertion of the origins of international law is widely accepted as authoritative. The Statute of the International Court of Justice in the Hague, Article 38, has been seen as a handy list of international legal sources.

In doctrine, customs have been classified according to the space in which the custom is applied and the number of participants: general customs, regional customs, and local customs *(Boghirnea, 2023 p. 150).*

In certain states, custom serves as a primary source of law, provided that it does not conflict with public order, good manners, or morals. Furthermore, the general principles of law are only to be enforced when there is no law or custom. *(Boghirnea, 2011).*

International law is based on both treaty law and customary international law. Treaties are documented agreements in which States formally set certain rules. In contrast, customary international law is unwritten and comes from "a general practice accepted as law." To prove that a specific rule is customary, it is necessary to show that it is evident in state practices and that the international community views such practices as legally obligatory.

It is widely acknowledged that governments' consistent and pervasive practices serve as the foundation for customary international law. International custom is seen as a source of international law since it is believed that if governments behave consistently, they may be doing so because they feel obligated to do so by law, a concept known as opinio juris. A new rule of international law is established if enough governments behave consistently, out of a sense of duty, for an extended amount of time *(Baker, 2010).*

Customary international law is universal in its reach.' It is not subject to control by a few actors in the international legal process, and it binds all participants in international and non-international armed conflicts to the extent that it applies to such conflicts *(Paust, 2006).*

Customary international law also provides relevant *rights* for all participants in international or non-international armed conflicts whether or not they are nationals of a state, nation, or belligerent that has ratified a treaty reflecting the same rights. Concerning treaty-based rights, it is worth emphasising that the nationals of a state that has ratified the 1949 Geneva Conventions are bound by and have numerous express and implied rights under such treaties *(Paust 2006).*

Article 38 of the Statute of the International Court of Justice identifies “international custom, as evidence of a general practice accepted as law” as the second source of law that the Court uses. This means that customary international law (CIL) requires two elements: state practice and opinion juris, which is the belief that the practice is legally obligatory. A fundamental principle of international law is that sovereign states must consent to be bound by international legal obligations *(Barret 2020).*

CUSTOMARY INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS IN ARMED CONFLICTS

The customs of armies as they evolved over time and across all continents are the foundation of international humanitarian law. Not every army followed the "laws and customs of war," as this area of international law has historically been referred to, and not all foes were subject to the same regulations. However, the general trend was behavior restriction toward both combatants and civilians, mostly due to the idea of the soldier's honour. The laws, which were created by the armies themselves and also inspired by the writings of religious leaders, generally forbade actions deemed to be unduly cruel or dishonourable *(Henckaerts & Doswald-Beck 2009, p.31).*

In the five decades since the Geneva Conventions were adopted in 1949, armed conflicts have surged across nearly every continent. These essential treaties, which include the four Geneva Conventions and the Additional Protocols of 1977, aim to protect individuals not directly involved in hostilities, such as the wounded, the sick, prisoners of war, and civilians. Unfortunately, these agreements have often been violated, resulting in significant suffering and unnecessary deaths. This underscores the urgent need for better adherence to International Humanitarian Law, emphasizing the importance of upholding humanity's principles even in times of conflict *(Henckaerts & Doswald-Beck 2009, p.32).*

I. THE CONTRIBUTION OF INTERNATIONAL CUSTOMARY AND HUMANITARIAN LAW TO THE RESOLUTION OF CONFLICTS

International humanitarian law (IHL) is specifically designed to regulate the behaviour of parties engaged in armed conflicts. Its main purpose is to govern interactions between warring factions while upholding the essential rights of individuals under the control of opposing forces. IHL aims to protect not only combatants but also non-combatants, such as civilians and medical personnel, ensuring that the atrocities of war do not impact those uninvolved in the fighting *(Gasser, 2000, p.99).*

To justify intervention in the war on the grounds of a global order that the United States believed it had the right to impose by force of arms, Wilson described the German military navy's actions on April 2, 1917, as warfare against mankind. The United States violated the tradition that has been in place since the Peace of Westphalia (1648) by "claiming the right to decide the justness or unjustness of war in the name of humanity, democracy, and international law." This tradition states that any sovereign state can declare and wage war against other sovereign states to protect its interests while still being recognized as a iustus hostis as a partner in achieving peace *(Avrigeanu, 2017, p.34).* The rules of international law outlined in agreements, treaties, etc. that the parties agreed to uphold, as well as the widely accepted customary principles and standards of international law, must be adhered to during armed confrontations between two or more states. To minimize the devastation and negative effects of war, international humanitarian law is a body of customary or conventional

international legal norms designed to specifically regulate issues that arise in situations of international or non-international armed conflict *(Zlate, Tusa, Iancu 2022, p.168).*

The alleged customary right to self-defense, self-intervention, and self-protection was argued in the pleadings in Corfu Channel, UK. The Court dismissed the British defense of Operation Retail, citing reasons that it was in violation of international law. It is noteworthy that the Court did not cite a UN Charter standard because Albania was not a UN member state at the time. Its argument was founded on the idea of sovereign equality because respect for territorial sovereignty is a fundamental tenet of international relations. Regarding the intervention, the Court rejected the British claim that it was the expression of a policy of force that had historically led to the most severe abuses and that, regardless of current flaws in international organization, could not be justified under international law. It appears that the ICJ's ruling reflects the prevailing customary law *(Czaplinski, 2016, p.715).*

All subjects of international law are bound by customary international law. The principles of customary international humanitarian law undoubtedly bind international organizations. However, according to the principle of conferred powers as stated in the advisory opinion on reparations for injuries suffered in the service of the United Nations, their binding force is restricted to the activities carried out within the specific organization's statutory powers *(Czaplinski, 2016, p.731).*

Many of the regulations pertaining to the application of international humanitarian law have been incorporated into customary international law. First and foremost, each party to a conflict must ensure that its armed forces, as well as any individuals or groups operating (in reality) under their direct supervision or direction, respect and uphold the application of international humanitarian law. As a result, every party to the conflict including armed opposition groups must instruct and guide their armed forces regarding international humanitarian law.

Criminological research, according to Iancu, discusses the drama of the victim, the offender, and the social control agent. It also discusses three different kinds of acts: criminal response, passing to action, and prevention. *(Iancu 2018, p.151).*

Regarding individual responsibility, Customary International Law and Humanitarian Law require accountability for crimes committed by all persons who commit crimes, give orders to commit crimes, or in some way are responsible as commanders or superiors for the commission of war crimes. The enforcement of the war crimes regime, or the investigation of war crimes and the prosecution of suspects, is an obligation incumbent on states. States may be relieved of this obligation by establishing international courts or mixed tribunals for this purpose.

In addition to codifying the initial standards of Customary International Law, Additional Protocol I established the framework for the development of new customary regulations. Evidence of the profound influence of Additional Protocol I on state practices, both in international and non-international armed conflicts, can be found in the practices collected for our study (see below). Beyond the scope and influence of the Protocol, the study found that the fundamental ideas of Additional Protocol I are widely accepted and implemented. Despite the fact that the study's objective was not to ascertain whether the provisions of particular treaties were customary, it did conclude that many customary norms are comparable to those found in treaty law *(Henckaerts & Doswald-Beck 2009)*.

The most important contribution of Customary International Law and International Humanitarian Law to the resolution of internal armed conflicts lies in the fact that it goes beyond the provisions of Additional Protocol II. The practice has created a significant number of customary rules that are more detailed than the frequent and general provisions of Additional Protocol II and, in this way, have filled significant gaps in resolving internal conflicts *(Henckaerts & Doswald-Beck 2009)*.

II. INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

Armed conflict victims are intended to have the bare minimum of protection under international humanitarian law. The 1949 Geneva Conventions and the 1977 Additional Protocols safeguard particular fundamental rights for people in certain situations about both international and domestic armed conflicts. International human rights law, on the other hand, has a wider reach than international humanitarian law.

International humanitarian law only addressed armed conflict between states before the middle of the 20th century. "The initiation and waging of war was an exercise of sovereign power, a prerogative held by State, suitable for regulation by international law," as this statement reflected. Therefore, non-international armed conflicts were strictly regarded as being outside the purview of international regulations, except the widely accepted recognition of belligerency, which was quickly becoming outdated. In the Tadić Jurisdiction Decision, the International Criminal Tribunal for Yugoslavia Appeals Chamber reaffirmed four factors that contributed to this historical development: the need for protection and regulation mechanisms in light of the increasing frequency of internal conflicts, the evolving character of those conflicts (long-lasting), the growing participation of third states, and the use of proxies. The change brought about by the Universal Declaration of Human Rights, which states that "a state sovereignty approach has been gradually supplanted by a human-being-oriented approach," is equally important *(Nejbir, 2021 p.37-70)*.

According to Wood, there are at least three significant distinctions between international humanitarian law and international human rights law, at least one of which is pertinent to the topic of this contribution. *The two* types of law, international human rights law and international humanitarian law, are quite different. They have different goals and policies. Another important difference is how they are enforced. International human rights law is often enforced through courts and international supervisory bodies, while the enforcement of international humanitarian law is less likely to involve a court. International courts and tribunals can only have jurisdiction if the state involved agrees to it. This means that even if there are rules for reparations, it's rare to enforce them through the courts. Additionally, international humanitarian law applies universally, meaning it applies to all states unless a state can prove it consistently objects to it *(Wood, 2018).*

On the other hand, human rights law varies significantly from region to region. For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms outlines five specific circumstances in which detention is allowed. In armed conflict, the International Court of Justice has stated that human rights protections remain in effect unless explicitly suspended under provisions such as those in Article 4 of the International Covenant on Civil and Political Rights. When examining the relationship between international humanitarian law and human rights law, there are three potential scenarios: some rights are governed solely by international humanitarian law, some are governed only by human rights law, and some are subject to both frameworks *(UNHR, 2011).*

The European Convention on Human Rights and Fundamental Freedoms, which is enforceable under national law in every contracting state, is examined by some authors. They also emphasize that the European Union's Charter of Fundamental Rights, which has the same legal force as the Treaties, also outlines the freedoms and rights safeguarded by this act *(Franguloiu, Hegheș, Pătrăuș, 2023, p.141).*

Fundamental rights are those that are necessary for human existence (e.g. G. both the rights to liberty and life). From one historical period to the next or from one state to another, these fundamental rights may change or evolve *(Spătaru-Negură, L.-C. 2024, p.4).*

Kodra claims that there is a growing recognition of international humanitarian law as a component of international human rights law that applies in times of armed conflict. This is because human rights are protected by international humanitarian law and cannot be diminished by states, even in dire circumstances like armed conflict. Since both human rights law and international humanitarian law focus on protecting individuals, they share many similarities. In international armed conflicts, both human rights law and international humanitarian law are applicable and can be enforced concurrently. Some rules of

international humanitarian law and human rights law are similar. Non-discrimination, which is one of the key principles of international human rights law, is also a central concept in the Geneva Conventions related to the law of armed conflict. The right to life, as international humanitarian law calls for, as far as possible, the protection of life during hostilities and prohibits arbitrary killings or executions of persons under the control of an authority *(Kodra, 2012, p.113).*

The key point is that while humanitarian law applies only during armed conflicts as outlined in Common Article 2 of the 1949 Geneva Conventions human rights law is applicable in both peacetime and wartime. According to the European Union Guidelines on promoting compliance with international humanitarian law, "International Humanitarian Law is applicable in times of armed conflict and occupation." In contrast, human rights law applies to everyone within a state's jurisdiction during both peace and conflict. The International Criminal Tribunal for the Former Yugoslavia has established that human rights law and humanitarian law are mutually complementary, and it is both appropriate and necessary to use one to inform the other. Given their similarities in goals, values, and terminology, referring to human rights law is generally a helpful way to clarify the content of customary international law within humanitarian law. In some respects, international humanitarian law can be seen as merging with human rights law. However, the Tribunal emphasized that concepts developed in the realm of human rights can only be incorporated into international humanitarian law if they account for the specific characteristics of humanitarian law *(Orakhelashvili, 2008).*

In 2010, the Security Council demonstrated its opposition to the impunity of grave violations of international humanitarian law and human rights standards. It also promoted the defense of accountability through the use of various tools, including truth and reconciliation commissions, national victim reparations programs, institutional reforms, and traditional dispute resolution procedures. This has an impact on the State's pledge to "seek sustainable peace, justice, truth, and reconciliation," to "end impunity," and to "ensure that all UN activities aimed at restoring peace and security respect and promote the rule of law." The UN General Assembly adopted the Basic Principles and Guidelines on the right of victims of grave violations of international humanitarian law and gross violations of human rights standards to seek restitution and remedies in 2005. an instrument that concentrates on victims' rights and states' responsibilities *(Remón, 2021).*

According to Duner, the defence of human rights may implicate the use of violence, as in the idea of humanitarian intervention. Kosovo is frequently held to be the purest case of humanitarian intervention that has taken place and ushered in a new era in the defence of human rights *(Duner, 2001).*

CONCLUSION

International human rights law sets important limits on the power of the state, ensuring that all individuals under its authority are treated with dignity and respect. These limits apply universally, even during times of crisis, emphasizing the inalienable rights of every person. This framework aims to protect civil, political, economic, social, and cultural rights, affirming that these rights must be upheld regardless of the circumstances.

Additionally, customary law is crucial in addressing the gaps left by written law, whether due to its nonexistence or its inapplicability for example, because of the difficult process of ratifying and signing.

The origins of international humanitarian law can be traced back to ethical principles concerning honour and the expected civil conduct of professional armies. Key historical practices and agreements, including the Geneva Conventions, have influenced its development, highlighting the necessity of alleviating the harsh realities of war.

International human rights law has a diverse origin, emerging from various cultural traditions, historical events, and social movements that advocate for individual dignity and rights. Its development has been shaped by a range of philosophical, legal, and political perspectives, highlighting the universal importance of recognizing and upholding human rights. A key distinction between international human rights law and international humanitarian law is their approach to armed conflict and the use of force. While international humanitarian law acknowledges the reality of conflict, it emphasizes that using armed force should not be seen as a legitimate way to resolve disputes. Instead, it aims to protect non-combatants from the devastating consequences of war, prioritizing humanitarian protections over a mere code of honour for combatants. This shift reflects a broader understanding of the need for compassion and restraint in the face of violence, focusing on reducing human suffering and maintaining dignity during times of conflict.

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