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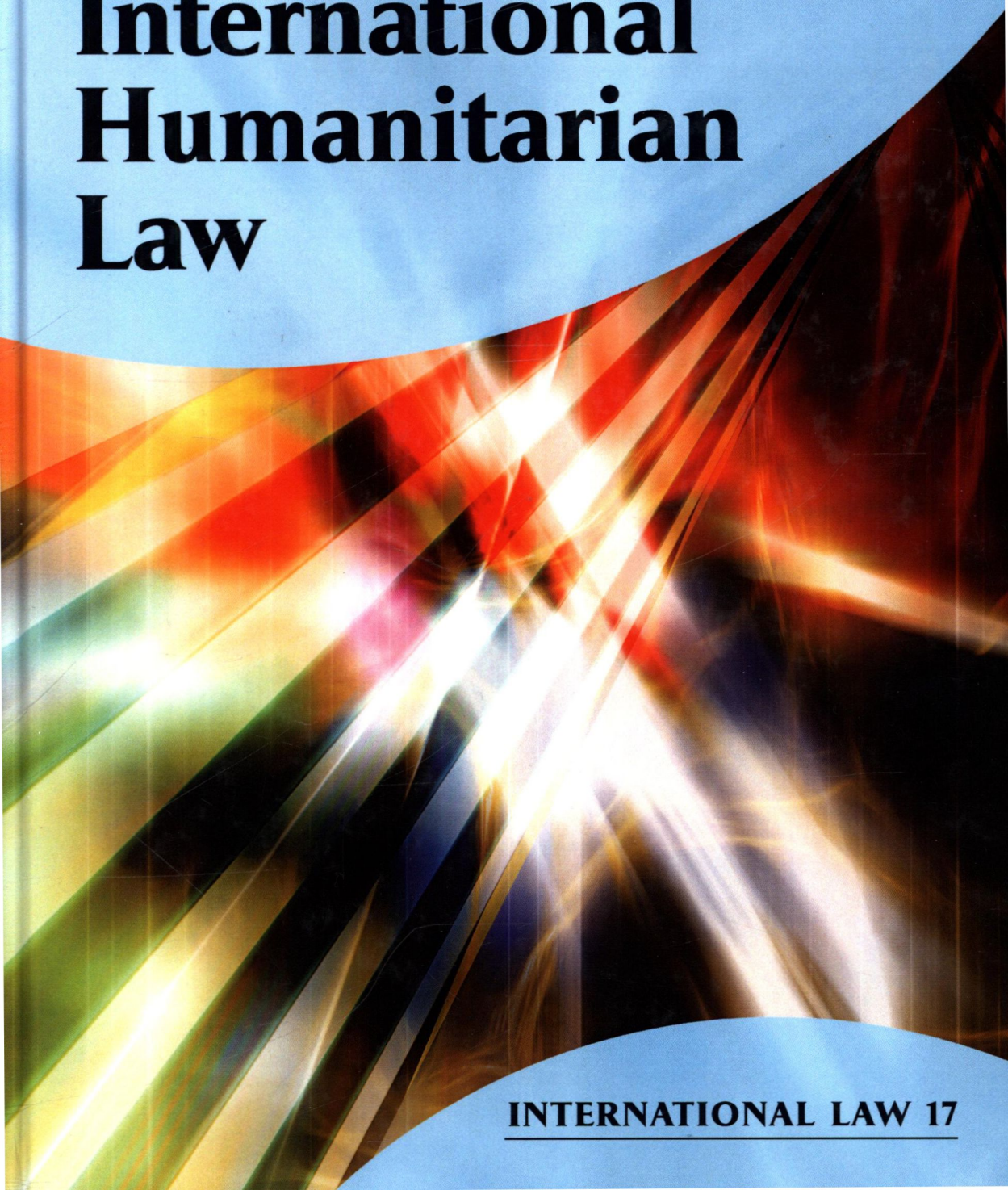

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John Cerone holds the Paul Martin Senior Professorship in International Affairs and Law at the University of Windsor, Faculty of Law, Canada and is Visiting Professor of International Law in the Fletcher School of Law and Diplomacy at Tufts University, USA.

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Introduction

John Cerone

Introduction[1]

The traditional function of international law is to regulate relations between and among states. This function continues even when these relations degenerate into armed conflict, for during such conflicts '[t]he right of belligerents to adopt means of injuring the enemy is not unlimited'.[2] Indeed, in the classical period, all of international law was divided into two principal categories – the Law of Peace and the Law of War. Relations between any two states were regulated by one or the other, depending on whether a state of war existed between them.

International humanitarian law (IHL), known also as the law of armed conflict, the law of war, or the *jus in bello*, is one of the oldest subject areas of international law. It refers to the corpus of international norms that regulates the conduct of hostilities and that provides specific protections for persons not taking part, or no longer taking part, in the hostilities.

IHL is separate and analytically distinct from other related areas of international law, such as international human rights law, the *jus ad bellum* (that is, the legal rules governing recourse to the use of armed force), and international criminal law in the strict sense.

While international human rights law and international humanitarian law both serve to protect individuals from abuses, they differ in philosophical basis, structure, field of application, remedy, and substantive scope. The question of whether and to what extent international human rights law applies simultaneously with international humanitarian law in situations of armed conflict and occupation has been hotly contested in recent years.

Humanitarian law must also be distinguished from the *jus ad bellum*, which regulates the lawfulness of a state's recourse to the use of armed force against another state. Indeed, a basic principle of international humanitarian law is its independence from the *jus ad bellum*. From the perspective of IHL, it does not matter which belligerent was the aggressor. All parties to the conflict are equally bound by the *jus in bello*.

International criminal law in the strict sense (ICL) refers to those rules of international law the breach of which gives rise to individual criminal responsibility. While certain serious violations of IHL have been criminalized, and as such constitute war crimes under ICL, the respective bodies of law are not co-extensive. Not every breach of IHL constitutes a war crime, and war crimes are but one category of crime within ICL.

Scope of Application[3]

A threshold issue in IHL is the establishment of the conditions under which this body of law will be applicable to a given situation. The law of armed conflict applies only in times of armed conflict or occupation. One of the strengths of IHL is that it applies on the facts, and is

generally unconcerned with political labels. Thus, a formal declaration of war is not necessary to trigger the application of IHL so long as an armed conflict or occupation in fact exists. At the same time, the existence of a situation or armed conflict is a *sine qua non* for the application of IHL (with the exception of a very few peacetime provisions, such as the obligation to train forces and disseminate the text of the Geneva Conventions). Thus claims that drone attacks constitute war crimes or other violations of IHL when committed outside situations of armed conflict or occupation are self-defeating.

While neither the Hague Conventions nor the Geneva Conventions define the phrase 'armed conflict', definitions for both international and non-international armed conflict have been set forth in international jurisprudence. According to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), an armed conflict exists 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[4] This definition has subsequently been adopted by a number of other international courts and tribunals.

Generated and embedded within the classical system of international law, IHL originally regulated only those armed conflicts that were international (that is, interstate). The events of World War II, however, spurred a number of developments in international law that struck at the core structure of the system, including the emergence of the individual as a subject of positive international law and the erosion of the non-intervention principle.

These developments are reflected in the subsequent evolution of humanitarian law, resulting in an expanded scope of application. The Geneva Conventions of 1949 pierce the veil of the state in a number of important ways. They speak in terms of rights of individual human beings (and not only of states), provide for direct application to non-state actors (in particular, non-state, organized armed groups), move away from strict reciprocity (for example, with an explicit prohibition of reprisals against protected persons and their property[5]), require prosecution of those individuals responsible for grave breaches of the Conventions, and for the first time in a multilateral treaty, extend the application of some basic rules of humanitarian law to armed conflicts 'not of an international character'.[6]

While the 1949 Conventions provided only minimal regulation for non-international armed conflict,[7] the number of rules of IHL applicable to such conflicts has grown significantly since that time through the elaboration of the 1977 Additional Protocols to the 1949 Conventions, as well as through customary international law.[8] Additional Protocol I of 1977 extends application of the law of international armed conflict to wars of national liberation and similar armed conflicts. Additional Protocol II of 1977 applies to non-international armed conflict, expanding the law of non-international armed conflict beyond the minimal rules provided in Common Article 3 of the 1949 Conventions.

Among the many international legal controversies that have erupted during the post-2001 'War on Terror' has been a dispute over whether IHL governs any aspects of this global phenomenon. The threshold question of whether the War on Terror comprised a type of armed conflict to which rules of IHL would be applicable was seemingly preempted by the readiness of concerned states to adopt an armed conflict paradigm and to invoke at least some rules of IHL in an attempt to justify their use of force against Al Qaeda and affiliated forces. The legal question is simply whether, as a factual matter, one or more situations of armed conflict exist. Those facets of the War on Terror that constitute armed conflict are governed by IHL.

A related controversy concerned the issue of whether IHL would apply to transnational, non-international armed conflicts (that is, armed conflicts that are neither inter-state nor internal (occurring wholly within the territory of a single state)). This dispute has largely been resolved in favor of application of at least some rules of IHL (for example, Common Article 3 of the 1949 Geneva Conventions and certain other fundamental IHL rules that are now regarded as customary law in non-international armed conflict) to such conflicts.[9]

IHL applies in times of occupation as well as armed conflict. Indeed, the Geneva Conventions make clear that they apply to all cases of partial or total occupation, 'even if the said occupation meets with no armed resistance'.[10]

According to the Fourth Hague Convention of 1907, 'Territory is considered occupied when it is actually placed under the authority of the hostile army'.[11] Key elements of this definition include the establishment of effective control and the absence of the consent of the territorial sovereign. Controversies over the interpretation of both of these elements have arisen in a number of cases in recent years, including in relation to Kosovo, Afghanistan, Iraq, Gaza, and Ukraine, among others. These controversies have included disputes over when a situation of occupation was initiated, when it was terminated, and whether it constituted occupation at all.

Basic Principles[12]

The corpus of IHL rests on a set of fundamental principles, which at the same time constitute the earliest antecedents of modern humanitarian law. These include the complementary principles of necessity and humanity, and of distinction and proportionality, as well as the principle of precaution and the combatant's privilege.

While the principle of humanity was aimed at reducing human suffering, it is tempered by the principle of military necessity, which reflects the interests of the warring parties in avoiding conferral of a military advantage on the opposing party to the conflict. Thus, weapons were prohibited only if they were designed to cause *unnecessary* suffering or *superfluous* injury, and certain prohibitions, such as the intentional destruction of civilian property, could be overridden in the face of military necessity.

A complementarity is also found between the principle of distinction and the permissibility of civilian casualties in the form of proportionate collateral damage. The principle of distinction requires that 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'.[13] Civilian casualties may result, however, in the course of an attack against a military objective. The lawfulness of such an attack will be preserved so long as the expected collateral damage is not 'excessive in relation to the concrete and direct military advantage anticipated'.[14]

As may be gleaned from these principles, many provisions of IHL are premised on a bargaining of sorts. For example, certain protected objects retain their protected status only so long as they are not used in support of military operations. Thus, when soldiers take up residence or store weapons in a church, the church becomes a military objective, losing the protection otherwise afforded to it under humanitarian law.[15]

Similarly, civilians lose their protection against direct attack if, and for so long as, they directly participate in the hostilities.[16] While the ICRC has issued guidance setting forth

criteria for establishing such direct participation in the hostilities, disagreement remains as to the precise contours of these criteria. A related controversy concerns the distinction between civilians and members of non-state organized, armed groups.

The principle of precaution also concerns protection of civilians and the civilian population. This principle requires that the parties to a conflict take constant care to 'spare the civilian population, civilians and civilian objects'.[17] Precautionary measures include giving 'effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit'.[18] This principle applies both to attacking and defending parties. For example, both parties 'must, to the extent feasible, avoid locating military objectives within or near densely populated areas'.[19]

Another fundamental principle of IHL is embodied in the combatant's privilege. While the above-mentioned principles impose restraints on the conduct of hostilities, the combatant's privilege affords combatants a privilege against criminal prosecution for their war-related acts, such as killing enemy combatants and destroying enemy military objectives, so long as their acts comply with IHL. Thus, while IHL regulates the means by which such killing is effected, privileged combatants are immunized from prosecution for the act of killing itself, so long as the selection of target and manner of killing was within the bounds of IHL. Another aspect of this privilege is Prisoner of War status. Upon capture by the enemy, combatants are entitled to this special status, which provides a wide range of protections, the majority of which are set forth in the Third Geneva Convention of 1949. Eligibility for this status has remained a source of controversy, including in relation to the post-9/11 Guantanamo detainees.

Hague Law and Geneva Law[20]

The nineteenth century saw the conclusion of the first multilateral treaties codifying the law of armed conflict. The most comprehensive IHL treaties are the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949, supplemented by the Additional Protocols of 1977. In general, these treaties track two different strands of humanitarian law, known simply as the Hague law and the Geneva law.

The Hague law consists primarily of restraints on the conduct of hostilities, including the outright prohibition of certain methods and means of warfare. The rules of the Hague law prohibit, for example, attacks against particular objects, such as undefended towns or religious institutions, and the employment of weapons calculated to cause unnecessary suffering or superfluous injury.

The Geneva law focuses on the protection of individuals who are not or are no longer taking part in hostilities. Each of the four Geneva Conventions protects a different category of such individuals. The First and Second Geneva Conventions protect sick and wounded soldiers in the field and at sea,[21] respectively. The Third Convention regulates the treatment of prisoners of war. The protection of civilians is the province of the Fourth Convention. The Additional Protocols to the Geneva Conventions simultaneously update and merge the Hague and Geneva law.

Some Basic Rules[22]

Some of the other basic rules of IHL, largely derived from the principles noted above, are the following. Persons *hors de combat* (that is, an individual who has been removed from combat, for example, through sickness or detention) and those not taking direct part in hostilities must be protected and treated humanely without adverse discrimination. It is forbidden to kill or injure an enemy who surrenders or is *hors de combat*. The wounded and sick must be collected and cared for by the party that has them in its power. The Red Cross emblem, which is used to protect humanitarian or medical establishments and personnel, must be respected. Captured individuals under the authority of an adverse party are entitled to have their basic rights respected; in particular they must be protected against violence. All persons are entitled to basic judicial guarantees. In addition, certain acts are specifically prohibited. These include torture, the taking of hostages, the use of human shields, rape, the imposition of collective penalties, pillage,[23] and reprisals[24] against protected[25] persons.

As noted above, IHL also regulates the use of weapons during armed conflict and occupation.[26] Parties to the conflict cannot use weapons that are 'of a nature to cause superfluous injury or unnecessary suffering'.[27] The use of certain types of weapons has also been limited by treaties specific to each type of weapon. The advent of cyber weapons and cyber-attacks has generated a great deal of debate over the application of IHL to such attacks. Attacks by weaponized unmanned aerial vehicles, or drones, have been particularly controversial. The debates surrounding such attacks have tended to conflate issues of the *jus ad bellum* and the *jus in bello*. Targeted killings of enemy fighters are permissible under international humanitarian law; however, the question of whether the use of armed force is at all permissible would still be governed by the *jus ad bellum*.

The Law of Occupation[28]

As noted above, IHL applies in times of occupation as well as armed conflict. The Law of Occupation is based on the notion that occupation is temporary, pending some final settlement. It employs the legal concept of usufruct. Without taking a position on whether the occupant has a legal right to be there (which would be a question of the *jus ad bellum*), the law of occupation recognizes the occupant's possession of, use (*usus*) of, and ability to exploit the fruits of (*fructus*), the occupied territory. Thus, Occupying Powers are not prohibited from using the territory or its fruits. However, the conception of occupation as a temporary situation yields a certain legal stasis under IHL. The Occupying Power is barred from changing the law and institutions of the occupied territory, unless absolutely necessary to do so for security reasons or to achieve certain public goods set forth in the Hague Law. The so-called 'transformative occupations' of recent years have caused some controversy, at least partially because of the perception that they have violated this stasis principle.

The Law of Non-international Armed Conflict[29]

Reflecting the continuing vitality of the non-intervention principle, the distinction within IHL

between the law of international armed conflict and the law of non-international armed conflict remains significant.

Among the four Geneva Conventions of 1949, only Article 3, which is common to the four conventions, expressly applies to non-international armed conflict. Common Article 3 provides protection from only the most serious abuses.[30] While Protocol II also applies to non-international armed conflict, it provides significantly less protection to individuals than does Protocol I, which is applicable only in international armed conflict or occupation. (Application of the 1899 and 1907 Hague Conventions, which of course predate these instruments, is similarly limited to situations of international armed conflict.[31])

A peculiar feature of the law of non-international armed conflict is its application to non-state groups. As noted above, the traditional subject of international law is the state. However, over the course of the past century, the principle that only states could be the subjects of international legal obligations yielded to the changing values and nature of the international community. By its terms, Common Article 3 of the Geneva Conventions binds both states and non-state parties to non-international armed conflicts. In addition, certain norms of IHL have evolved into norms of international criminal law, which directly binds individuals.

Another important feature of the law of non-international armed conflict is the absence of the combatant's privilege. Members of non-state organized, armed groups in a non-international armed conflict (for example, rebel soldiers) face the possibility of criminal prosecution for every act that violates the state's criminal law. While Protocol II, in the interests of stabilization and reconciliation, expresses a policy in favor of amnesties for ordinary crimes in such conflicts, it is increasingly accepted that there can be no amnesties for war crimes even in a non-international armed conflict.[32]

The Continuing Relevance of Customary Law[33]

Notwithstanding the codification of humanitarian law, the general principles and customary law of armed conflict as developed through the centuries continue to apply in a residual manner, filling any gaps between the express provisions of treaty law. As set forth in the famous Martens clause:[34]

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[35]

The customary status of IHL rules is also significant in relation to those states that are not parties to certain IHL treaties. Some states, including such significant military powers as the United States, have declined to become parties to the Additional Protocols to the 1949 Geneva Conventions. While these states are not bound by the Protocols as such, they are bound by the rules contained therein to the extent that these rules have evolved into customary law. The International Committee of the Red Cross, in its study of customary international law, has found that the overwhelming majority of IHL rules have achieved the status of customary law,