International humanitarian law emerged after the Second World War in the framework of the law of armed conflicts. Since then, two categories of international humanitarian law have been distinguished: the original international law of armed conflict restricting the methods of warfare, and another body comprising rules for the protection of life and human dignity in times of war (Courstier 1955). Thus the international law of armed conflict contains a body of international legal rules that are applicable in times of armed conflict. They are “a minimum of humanity for inhumane situations” (Sassoli 1995, 218).

On the other hand, the core sector of international humanitarian law is more limited. It is made up of provisions dealing with the means and methods of warfare, the distinction between combatants and the civil population and the protection of specific groups of persons (civilians, internees, captives, wounded, sick and shipwrecked) and objects (hospitals, hospital ships and cultural goods). International humanitarian law decides on the legality of the use of force by states. Most rules cover the treatment of citizens of the opponent, and third states, by a party to the conflict.

Scope of Application

Before the Second World War, the application of the law of armed conflict commenced with a formal state of belligerence. Thereafter, the states effectively prevented formal declarations of war through the prohibition of the use of force (→ Use of Force, Prohibition of). Since international humanitarian law seeks however to extend protection to the civil population, insofar as possible in all conflicts, it no longer refers to a state of belligerence. Rather it is applicable in all armed conflicts. Hence, the actual presence of armed conflict is decisive, and does not rest on the declaration of a state of belligerence by a state.

There has remained a need to distinguish between international armed conflict (involving states, international organizations like the United Nations, and peoples in national wars of liberation), and non-international armed conflict. The regulation of the latter was particularly difficult. This is now covered by Article 1 (1) of the Additional Protocol II of 8 June 1977 to the Geneva Conventions of 12 August 1949 (AP II), according to which a non-international conflict takes place on the territory of a contracting state between armed forces and insurgent armed forces or other armed groups serving a responsible command. The latter must exercise control over a part of the sovereign territory, and be capable of performing long-lasting, coordinated combat actions, and to apply AP II. Thus the scope of their application has become somewhat narrowed. On the other hand, the common Article 3 of the Geneva Conventions of 12 August 1948 (GC) is applicable in an essentially wider scope, as they cover all armed conflicts without international character. At the same time, the distinction between these conflicts and other violent acts, such as banditry and terrorism, is particularly difficult. In these cases international humanitarian law is not applicable, but the requirement for respect of human rights remains in effect.

Practice shows that there is an increasing overlap between international humanitarian law and the human rights instruments – in particular regarding the indefeasible human rights which may not be derogated (Heintze 1993) (→ Human Rights; → Human Rights Conventions and their Measures of Implementation). These intend an extension of protection of the civil population that is as comprehensive as possible.

International Regulation

In 1864 the first convention on the amelioration of the condition of wounded in armies in the field was enacted in Geneva. This was the starting point of the
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codification process of international humanitarian law which still continues today.

Fundamental steps up to the Second World War were the Declaration of St. Petersburg of 1868 aiming at the prohibition of the use of certain projectiles in times of war, and the two International Peace Conferences of 1899 and 1907 in The Hague. These led to agreements on the limitation of means and methods of warfare. Deserving special mention are the Hague Regulations on Land Warfare of 18 October 1907 (HRLW), the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Conventions of 1864, as well as the Declaration on the prohibition of bullets that easily expand or flatten themselves in human bodies (Dum-Dum bullets). Since most rules were agreed on in The Hague, this body of law is often called “Hague Law”, to be distinguished from the “Geneva Law” comprising the strict international humanitarian law as elaborated in Geneva.

After the shock of the Second World War, the International Committee of the Red Cross (ICRC) initiated in 1949 a diplomatic conference for the codification of international humanitarian law. There, the four Geneva Conventions were elaborated, which by October 2008 had been ratified by 194 states. These are thus the most important sources of international humanitarian law.

The First Geneva Convention aims at the amelioration of the conditions of the wounded and sick of armed forces in the field, the Second Convention serves the same object in regard to the naval forces, the Third Convention regulates the treatment of prisoners of war and the Fourth Convention provides for the protection of the civil population. Since almost all states are parties to the Geneva Conventions, they are of nearly universal scope.

It is important to note that all four contain a common Article 3, which establishes a minimum standard for the observance of fundamental human rights in non-international armed conflicts, as opposed to resistance.

Both Additional Protocols (APs) to the Geneva Conventions were agreed upon in the course of the Diplomatic Conference of 1974-1977. These confirm and modernize both the Hague and the Geneva Law, in that they deal with the status of national liberation movements and internal conflicts in international humanitarian law. AP I refers to international armed conflicts, and AP II to non-international. Since the APs confirm and modify both the Geneva and the Hague Law, this distinction is widely regarded as obsolete (Risse 1991, 180). Although the protocols have initially been subject to criticism by the Western super-powers – because of the ban on nuclear weapons which can be deduced from AP I – they have in the meantime (October 2008) been ratified by not less than 168 (AP I) and 164 (AP II) states respectively. Amongst them are the nuclear powers of Russia, China and Great Britain, however not the USA. Israel still cannot be found on the list of ratifying member states.

At the request of the 26th International Conference on the Red Cross and the Red Crescent movement in December 1995, the ICRC undertook a study on customary international humanitarian law. The main objective of the study was to fill some of the gaps in the treaty-based rules of international humanitarian law applicable in non-international armed conflicts which comprise the majority of armed conflicts in the world today. It took the ICRC ten years to complete the study on customary international law which was published in 2005 (Henckaerts/Beck 2005). It was compiled with the assistance of experts from more than 50 countries and state practice from 148 countries was analyzed.

The study concludes that many of the fundamental principles and rules of international humanitarian law are customary in nature and that most are applicable in both international and non-international armed conflicts (cf. Henckaerts 2005).

This opinion was also supported by the International Court of Justice (→...