

**Use of force is limited by IHL and by specific provisions
of IHRL**

1.1 Introduction

POWs have been a hot-button issue since the September 11, 2001 terrorist attacks and the ensuing war in Afghanistan. To find Osama Bin Laden and the al-Qaeda terrorist network, the United States has detained a number of suspects they believe to be associated with the Taliban government in Afghanistan. The detainees were sent to the US naval base at Guantánamo Bay, Cuba. Whether or whether the United States has complied with International Humanitarian Law (IHL) in its treatment of these non-prisoners of war is open to debate. Amnesty International and the International Committee of the Red Cross have launched requests for change in reaction to the appalling circumstances of inmates in Guantánamo Bay according to Borelli (2004).

International Humanitarian Law (IHL) has arisen as a reaction to the horrors of war. Henri Dunant's experiences during the Battle of Solferino sparked the first Geneva Convention of 1864, which laid the foundation for current humanitarian law. This century's major battles led to major legal reforms, culminating in 1949 Geneva Convention and 1977 Additional Protocol, which now form the basis of international law. POWs' rights are examined in this research, which concludes with a look at the current situation for those held in Guantánamo. Despite this, the United States contends that International Humanitarian Law (IHL) in its current form is irrelevant to the declared battle against terrorism.

There is an effort to find out whether these assertions are right and whether or not the Geneva Conventions need to be changed or if the current legal framework can be applied to all armed conflicts, including the nature of the war on terror.

All that we have mentioned leads us to a basic question, the basic research **problem**, namely, is the use of force limited by IHL?

To answer this problem, we will adopt the empirical literature method according to a codification process divided as follows:

The First Section: Background Overview about IHL:

Chapter One: Personal Scope.

Chapter Two: Parties bound by IHL and Human Rights Law.

The Second Section:

Chapter One: International Armed Conflicts

Chapter Two: Scope of Application

The Conclusion

FIRST SECTION

CHAPTER ONE: BACKGROUND OVERVIEW

2.1 Definition

It's impossible to define what it means to be directly involved in conflicts. An individual's "acts that, by their nature or goal, are meant to inflict serious harm on enemy persons and material" are considered direct engagement in hostilities by the Inter-American Commission on Human Rights. There is a clear and undisputed loss of protection from attack when a citizen uses firearms or other means of violence against human or material hostile troops. To say that the decision to engage in direct participation must be made on a case-by-case basis, or to simply reiterate the general rule that direct engagement results in civilians losing their protection from attack, is to say "direct involvement" may be understood in several ways.

Military manuals from Ecuador and the United States include examples of direct involvement in conflicts, such as serving as guards, intelligence agents, or lookouts for armed forces. People who work as spies, couriers, or watchmen are no longer shielded from harm, according to the Philippines' Report on Practices. An attempt was made by the Inter-American Commission on Human Rights to distinguish between participation that was "direct" and "indirect" in a report on Colombian human rights:

Civilians cannot be classified as combatants just because they support the conflict or military effort of the opposing side. If you're indirectly involved in a conflict without engaging in violence against the other side, for example, you may provide goods or express support for one or more armed groups. You can also fail to take action to prevent an armed group from entering your territory.

A distinction between direct and indirect participation has already been made by the UN Special Rapporteur for El Salvador on Human Rights. Even But international law makes clear that governments may implement legislation that criminalizes any participation in hostilities, whether direct or indirect.

Military logistical support provided by non-international actors is not considered active participation in international armed conflicts under the Rwanda Report on Practice. In Rwanda, military leaders answered to a questionnaire by saying that civilians who follow their troops in an international armed conflict in order to provide them with food, transport munitions, or communicate communications lose their civilian identities. Nevertheless, they are still civilians as long as they do not have weapons and support one of the sides in an intrastate armed conflict. As the research points out, in civil conflicts, individuals feel driven to support the side that controls them.

Outside of the limited circumstances listed above, such as the use of weapons and other means to commit acts of aggression against human or material enemy forces, no clear and consistent definition of "direct participation" has been developed in state practice.

It is stated in a number of military manuals that civilians working in military facilities such as weapons manufacturers are not authorized to actively participate in hostilities but are forced to face the hazards connected with an attack on such installations."

If an attack on a legitimate target results in casualties or deaths, every precaution, including striking at night, should be used to minimize the number of victims. There is no evidence that these individuals should be treated as quasi-combatants and assaulted under current state policy.

The categorization of a person in a situation of ambiguity is a difficult and time-consuming task. Additionally, the Additional Protocol I stipulates that "in the case of a person's identification being in doubt, that individual shall be considered to be a civilian" in international wars. This recommendation may be found in military handbooks in certain countries. Others worry about the military ramifications of enforcing this rule to the letter. Furthermore, this assumption does not trump commanders' duties to safeguard the safety of their troops and to preserve the military's position. Additional Protocol I When France and the United Kingdom adopted Additional Protocol I, it was evident that they meant it. Direct participation in hostilities must be assessed on an individual basis, as per the US Naval Handbook. Combatants must make an honest judgment of whether or not a particular civilian is at danger of being purposefully targeted based on their manner, location, and clothing.

In light of what has been mentioned so far, a complete assessment must be carried out within the limitations and restrictions of a given situation in order to evaluate if there are sufficient signals to approve an attack. It's not necessary to slam the door on somebody who seems untrustworthy.

State practice in non-international armed conflicts seldom addresses questions of doubt, despite the fact that a clear rule on the subject would be advantageous in defending civilians from attack. Balanced approach should be used in non-international conflicts as well as in international conflicts, if they are to be successful.

2.2 Personal scope

International Humanitarian Law protects civilians who are not directly engaged in war (IHL). Injured, sick, and shipwrecked or prisoner of war civilians are protected by this.

Regardless of whether or not a person lives in a warzone, the power of a state extends to all of its residents. Unlike International Humanitarian Legislation, there are no protected persons under this law according to Daniel (1998).

2.3 Customary international law as a source of IHL

States may contract out of customary international law if it does not represent *ius cogens* or if they repeatedly oppose to it, but it cannot be condemned or modified by reservation. The more complicated method by which custom is formed serves as a counterweight to these features. Also known as a trade-off between creating customary law and creating treaty law, this means that in theory at least there is a trade-off between customary law formation and the long-term stability of custom as a legal source. IHL's authority comes under significant threat because states routinely defy the supposed rules of customary international law when they engage in military action according to Kuper (2005). While some argued that IHL was doomed after the two world wars, others questioned the viability of giving state action total precedence in creating international law during both conflicts. Customary international law, on the other hand, has not gone out of style. Although the authors of this paper have not explicitly recognized this process, it is certain that it is widespread. Customary international law has grown significantly to compensate for a lack of state activity throughout time.

2.4 Critique of the new approach to customary international law with regard to IHL

Extra-legal norms are increasingly influencing IHL, even if they conflict with official practice. Criticism has been leveled at this new method for putting positive legislation at the service of personal political objectives. The present contribution proposes to add to this critique, by engaging with the new approach on its own terms, pointing out that the strong extralegal normative influence on customary international law is informed by the context in which it developed, namely the Nicaragua judgment and international criminal judgments.. As a result, applying this new customary international law approach to international humanitarian law (IHL) in general is not an easy task. To begin, the rules at issue were restrictions in Nicaragua and in the criminal courts' definitions of crimes (but not of individual responsibility). For such rules it's almost impossible to refer to state action and hence verbal actions must be used instead of real ones. To be sure, IHL isn't limited to outright bans; it also imposes a host of constructive responsibilities. Using the same approach to determining its content as custom is thus not applicable in all circumstances.. On the basis of this assumption, the governmental practice of replacing physical actions with verbal assertions may not be entirely acceptable with respect to IHL. A customary prohibition on the use of force was established in Nicaragua by the International Court of Justice (ICJ) based on the following reasoning: if a State acts in a way that appears to be in conflict with a recognized rule, but defends its conduct by citing exceptions or justifications contained within that rule, then whether the State' s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule itself. 71 Despite the wide variation in practice among states, the predominance of jurisprudence is assumed here. In this case, as Simma and Alston point out, the law is

already established. When it comes to enforcing peremptory rules such as bans on violence and torture, which are the norms most often associated with it, it's best suited.

It is possible to create law where there was none before by identifying standards based on normative considerations and then proclaiming any opposing activity to be illegal.

76 International criminal courts are an excellent example of this. On its inception, in an effort to avoid problems of whether or not all governments were adhering to particular agreements, the UN Secretary-General indicated that the Tribunal's subject matter jurisdiction would be limited to customary law. 77 Even though individual criminal liability had only just been created under international law, the ICTY used this new norm to get over a major obstacle: acts committed during non-international armed conflict. There would have been no hiding place if the Tribunal tried to rely on treaty law, and punishment would have been a blatant disregard for the rule of law. The impediment was obfuscated by relying on customary law. Tribunals have often relied on treaty articles, both approved by the relevant governments and others, to prove the existence of customary standards. However, if treaty provisions are seen as a reflection of customary law rather than treaty law, two of the limitations of the latter may be avoided. One is the date when the standard was established, which is evident in treaties but less so in custom. In addition, there are the norms of treaty interpretation, such as the need that the text of the treaty be relied upon unless it is unclear. 79 Although the wording of the treaty was explicit, courts have been able to advance teleological interpretations by treating treaty text as an indication of state practice or *opinio iuris*. When it comes to individual criminal responsibility in non-international armed conflicts, the lack of treaty law and individual criminal responsibility is the outcome of a conscious decision by states to remove such commitment and

accountability. 80 This may have been discovered if strict adherence to the rules of custom had been applied in the customary way. As a result, tribunals have been able to create new law where there was none previously since they were allowed to dispense with the necessity of state practice on the one hand and include under *opinio iuris* an endless number of sources. In light of the concept of legality, the creation of new customs in the framework of international criminal law is especially worrisome. Rather than just adopting the current approach of determining custom, international courts' jurisprudence has gone so far as to eliminate the need for state practice completely. There is no doubt that there is a moral imperative driving the efforts of the various tribunals, but it is precisely against this potential for misuse and abuse of new customary international law that Judge Robertson warned in the Child Recruitment case at the Special Court for Sierra Leone. When the activities are repugnant and disturbing, the concept of legality must be enforced more rigorously to guarantee that a person is not convicted because of their revulsion or because they are accused of committing a non-existent offense.

Dimensions of the world

Human rights legislation, on the other hand, has the power to transcend beyond the boundaries of a single country. There are international humanitarian laws (IHL) that regulate the behavior of governments participating in armed engagements on the territory of other countries. To apply the same reasoning to disputes that have an extraterritorial component, see: A war that spreads beyond the authority of a single country does not exclude the parties from their IHL obligations. It's common for individuals to presume that human rights legislation is applicable outside of the country because of regional and international court rulings. The problem is that we don't know precisely how it'll be put to

use. Extraterritorial application of human rights legislation is generally accepted in circumstances when a State has authority over a region or a person (e.g., a prisoner of war). Detention, for example. The applicability of human rights rules controlling authority beyond the United States is still subject to dispute in human rights case law.

CHAPTER TWO

3.1 Parties bound by IHL and human rights law

All parties to an armed conflict are obligated by IHL, which guarantees equal rights and obligations for both State and non-State actors, for the benefit of all people affected. Question 8 has been answered. A state's human rights laws apply to anybody who lives on its territory or is subject to its jurisdiction, and these laws lay forth expectations for how governments should treat their inhabitants and what they may and cannot do. According to human rights treaties and other sources, only States are covered by laws on human rights. Non-state armed groups are excluded. Unlike governments, they are unable to carry out all of the duties necessary to implement human rights norms in full. When a non-State armed force is able to behave like a real state authority because it has control over territory and its human rights duties are acknowledged, this generalization is not applicable according to Martti (2012).

SECTION TWO

CHAPTER ONE: INTERNATIONAL ARMED CONFLICTS

4.1 International armed conflicts

When civilians join in hostilities, they are no longer protected by Additional Protocol I's Article 51(3). We've had no issues. "They would be incongruous with Protocol I's goal and purpose and undermine its basis," Mexico asserted during the Diplomatic Conference preceding to its approval of Article 51 of Additional Protocol I. According to UK authorities, Article 51(3), which excludes civilians from protection from attack, was a "valuable reaffirmation" of an existing customary international law rule at the Diplomatic Conference. "Until and until they assume a direct part in hostilities," the United Kingdom said after ratifying the Convention on Certain Conventional Weapons. Civilians are not protected from attack if they take part in hostilities, according to a number of military documents. The rule is supported by official comments and reports. States that aren't signatories to Additional Protocol I nonetheless adhere to this custom. When the International Committee of the Red Cross (ICRC) requested that the Middle East conflict's parties follow the protection of civilians from attack, unless and until they took a direct role in hostilities, they replied positively to the ICRC's October 1973 proposal.

4.2 Non-international armed conflicts

A person's life is protected under Article 13(3) of the Additional Protocol II if he or she does not actively participate in the conflict. This clause is also included in other agreements for non-international armed situations.

Civilians are not sheltered from attack in non-international armed conflicts according to several military manuals that apply or have been employed according to Pictet (2016).

The Inter-American Commission on Human Rights (IACHR) concluded that civilians who participate in combat (either individually or as a group) are valid military targets because of what transpired in Argentina's La Tablada.

This legislation aims to create an imbalance between the military forces of the state and the armed groups of the opposition. For the duration of hostilities, an armed opposition group member may only be assaulted, although the government's armed troops can be attacked at any moment. As a consequence, individuals who are directly involved in the battle have an unfair edge over others who are just watching from afar.

It is vital to understand what constitutes direct involvement in hostilities and when direct participation begins and ends so that an attack on a civilian might be justified. Exactly how one becomes involved in conflicts is still up in the air, as explained below. Remember that the term "immunities" does not mean immunity from being arrested and prosecuted in any way.

CHAPTER TWO: SCOPE OF APPLICATION

5.1 Substantive scope of application

Human rights law and International Humanitarian Law (IHL) have many commonalities, such as the prohibition of torture, yet they also vary greatly. IHL addresses a broad variety of issues not covered by human rights law, such as the treatment of "combatants," "prisoners of war," and the maintenance of the red cross and red crescent insignia. Human rights legislation covers concerns that are not covered by international humanitarian law, such as press freedom, assembly rights, voting rights, and the right to strike, to name a few. Therefore, in certain locations, international humanitarian law and human rights law are sometimes implemented in opposition to one another. Even when it comes to violence or jail, especially.

Under International Law, lethal force is a required component of war, and the conduct of hostilities is regulated accordingly. Finally, military operations aim to defeat the military of the opposing force in order to achieve victory. So long as they aren't barred from doing so by law, parties in a conflict may attack one other's military objectives (including enemy soldiers). It does not matter whether a state or a non-state participant to an armed conflict commits violence against particular targets; IHL does not prohibit such conduct. For this reason, as well as others, acts of violence against persons or property that is not a military target, as well as indiscriminate attack, are prohibited under International Humanitarian Law (IHL). Human rights law governs legislation enforcement, not the conduct of conflicts between parties to a dispute, but rather the manner in which the State employs force. This means that when all other options have failed to preserve life, the use of force by law enforcement must only be employed as a last resort, and it must be precisely proportional. Internment, in which a person is held indefinitely to protect the safety of a government

official from an imminent threat, has significant differences in terms of procedural safeguards from both international humanitarian law (IHL) and human rights law (HRL). Both IHL and HRL have rules in place to ensure humane treatment of detainees, safe detention conditions, and fair trial rights. IHL does not require a judicial review of whether a detainee's detention is lawful during an armed conflict. Question 10: (Answered) Outside of armed conflict, noncriminal (i.e. administrative) incarceration is very unusual. Most of the time, people are locked up because they have been suspected of committing some kind of criminal offense. In accordance with the International Covenant on Civil and Political Rights, every anyone imprisoned for whatever cause is entitled to a judicial review of the legality of their custody. This is predicated on the premise that the courts are operating and that the justice system can handle any number of people apprehended at any one moment.

5.2 Interplay Of IHL And Human Rights Law

In light of the ramifications of military operations, international humanitarian law (IHL) and human rights law continue to be studied extensively. According to the International Court of Justice's 1996 Advisory Opinion, the International Covenant on Civil and Political Rights does not expire during times of conflict and that, in principle, the right to life cannot be arbitrarily stripped of one's person. The applicable *lex specialis*, which is supposed to control wars, must be utilized to assess what constitutes an arbitrary deprivation of life, according to the Court (2018).

It has been argued that human rights law is the *lex generalis*, but international humanitarian law (IHL) is the *lex specialis*, and only applies during armed conflict. Human rights law and International Humanitarian Law (IHL) are seen to be at odds when they come into conflict since IHL was established to deal with armed conflict.

Lex specialis has been questioned for its meaning and significance, although it is widely agreed that comprehending the interplay between international humanitarian law and human rights law is crucial. It's impossible to use the principle of complementarity when it comes to interacting with international law's two departments. Human rights and International Humanitarian Law (IHL) may conflict when applied to the same circumstances since they were intended for different purposes.

There are two primary ways in which international humanitarian law (IHL) is established: treaties and customary law. States produce international law primarily via treaties and the development of customary law.

6.1 Conclusion

To be considered civilians, one must be neither a member of the country's military nor a group that is participating in mass casualty evacuations or other types of collective self-defense, and so eligible to protection from direct assault until they actively join in hostilities. If an armed group, such as an irregular militia or volunteer corps or an organized resistance movement, is part of a party to a conflict, the same functional criteria that apply to international armed groups must be applied.

International humanitarian law (IHL) and human rights law continue to be researched intensively because of the repercussions of military operations. An international court's 1996 Advisory Opinion said that the International Covenant on Civil and Political Rights does not expire during times of war and that the right to life cannot be arbitrarily taken away from one's person. To determine what constitutes an arbitrary deprivation of life, the Court cites the relevant *lex specialis*, which is designed to govern wars (2018).

Human rights law has been said to be the *lex generalis*, whereas international humanitarian law (IHL) has been stated to be the *lex specialis* and only applies during armed conflict. Due to IHL's focus on dealing with armed conflict, human rights legislation and IHL are regarded to be at odds when they come into conflict.

A concern has been raised about *Lex specialis*' meaning and relevance, although understanding the connection between international humanitarian law and human rights laws is universally accepted as essential. When it comes to international law's two departments, the concept of complementarity cannot be applied. Due to their diverse aims, human rights and International Humanitarian Law (IHL) may clash when applied to the same situation.

Treaties and customary law are the two basic means by which international humanitarian law (IHL) is developed. Treaties and the formation of customary law are the primary means through which states create international law.

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