

# The logic of IHL

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# Origins

- At the international level, long predates HRsL
- Origins in military thinking – Sun Tzu, “The Art of War”, 1st century BCE
- Relevant principles found in the rules of most of the great world religions, including the three Abrahamic religions
- Relevant principles found in many tribal codes of behaviour e.g. in DRC & Somalia

# C19th developments

- One of the first areas of international law to begin to be codified (i.e. put into treaty form)
- Split between the rules on the resort to armed force (*ius ad bellum*) and the rules how fighting is carried out (*ius in bello*).
- Split between rules on the conduct of hostilities (e.g. targeting; proportionality; weapon use), also known as *Hague Law* and rules on the protection of victims (e.g. wounded, sick & shipwrecked, prisoners of war and civilians in the power of the other side), also known as *Geneva Law*

# BEWARE!

- Law of war/law of armed conflict (LOAC) & IHL
- US uses law of war; many US commentators include the *ius ad bellum* and the *ius in bello* in the phrase
- LOAC – used by most NATO members to include both Hague Law and Geneva Law
- IHL – strictly speaking only applies to Geneva law; used by ICJ, ICC and HRs bodies to include both Hague Law and Geneva Law
- This subject, whatever name is used, does not include refugee law; there are some provisions of IHL on forced movement

# BEWARE!

- Some commentators suggest that LOAC & HRsL share a similar goal, implying that they are broadly similar
- The goal of LOAC is NOT to protect civilians; it is to avoid *unnecessary* deaths, injuries, suffering & destruction
- When dealing with Geneva law (i.e. rules on the protection of persons in your power & control & for the most part away from the battlefield), it is easier to argue that deaths etc are unnecessary
- That is not true with regard to rules on the conduct of hostilities

# C20th developments

- 1907 Massive up-dating of the rules; mostly on conduct of hostilities but a few on POWs and occupied territory
- Reluctance to up-date rules on conduct of hostilities between 1907 and 1977
- 1949 Four Geneva Conventions (GCs) – only on the “protection of victims”; with the exception of one article (common article 3), only addresses international armed conflicts (IACs)
- 1977 Additional Protocols (API & II) to the Geneva Conventions; one on IACs (API) and one on non-international armed conflicts (NIACs - APII); mixture of Hague Law and Geneva Law

# Beware!

- Important to distinguish between IACs and NIACs
- Even though API & II contain rules on both the conduct of hostilities and the protection of victims, important to distinguish between the 2 types of rules
- “Protection of victims” has a technical meaning; means the rules on the protection of 4 categories of victims covered by the GCs
- Protecting civilians from the conduct of hostilities is part of the rules of Hague law, *not* Geneva Law
- Rules based on the obligations of the parties; *not* the rights of individuals

# Beware!

- R2P based on the protection of civilians; if it exists as a rule, it is part of the *ius ad bellum*
- UN uses “protection of civilians” as a mandate in peace support operations, whether under ChVI or ChVII
- LOAC affords some protection of civilians but it is not the primary focus of the rules



# 3 essential principles

- Principle of distinction > cannot target civilians or civilian property (i.e. make them the object of an attack, as opposed to harming them as an incidental by-product of a lawful military attack)
- Principle of proportionality – BEWARE: definition very different to that used in HRsL
- Principle of precautions of attack

# Rules also apply to fighting between armed forces

- Cannot use weapon or tactic that is likely to give rise to “superfluous injury or unnecessary suffering”
- Certain weapons or tactics are prohibited, wholly or in part, because the armed forces regard them as unfair (e.g. gas – invisible weapon; poisoned arrows – cannot see the poison)

# Rules on interpretation

- Rules on treaty interpretation found in Vienna Convention on the Law of Treaties, arts. 31-33
- BUT different fields of international law are handled in different ways
- E.g. HRsL – presumption in favour of the right; limitations interpreted restrictively; “living instruments”; focus on the *result* of the act/omission
- E.g. IHL – rules as they stand represent a balance between military necessity and humanitarian considerations; no reliance on military necessity outside the rules; rules interpreted as they stand – no presumptions; Hague law rules – rules addressed to the mind of the commander at the time of the attack; Geneva law – more scope for a result-based approach