UNIT 4 WHERE DO YOU FIND IHL?

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4.1 INTRODUCTION

In this unit, we shall discuss about the current sources of international humanitarian law, like customary practices, treaties, Conventions, Protocols and resolutions of General Assembly and Security Council of the United Nations. Identifying the sources of international humanitarian law would make your the easy to apply those rules in any given situation.

We shall also be familiar with the names and the major contents of the international humanitarian law instruments. There are about two dozens of major international humanitarian law instruments which are important to be understood.

We shall discuss the development of Geneva Law which regulates the protection of victims of warfare, like wounded, sick, and shipwrecked. We shall also discuss the development of the Hague Law which regulates the conduct of the participants in war, like soldiers and other person actively supporting them. At last, we shall learnt that in our times, the Geneva Law and the Hague Law have merged into each other in the form of treaties, namely, Additional Protocols I and II.

4.2 OBJECTIVES

After reading this unit, you should be able to:

- know the current sources of international humanitarian law;
- discuss the names and essential contents of some of the important instruments of international humanitarian law; and
4.3 WHAT ARE THE CURRENT SOURCES OF IHL?

As you already know the importance of the sources of law, it would be insignificant to tell you the importance of the current sources of international humanitarian law. Suffice would be to say that customary rules, treaties, Conventions, Protocols, Resolutions of the General Assembly and of Security Council of the United Nations are the current sources of international humanitarian law.

Treaty based rules are not enough to constitute the one and only source of international humanitarian law. Customary rules of international humanitarian law solve the problems related to the application of treaties as these would fill some of the gaps in the treaty based international humanitarian law rules applicable in the situation of non-international armed conflicts. Non-international armed conflicts comprise the majority of the armed conflicts in the world today. Customary rules of international humanitarian law improves the compliance of law as a whole and tries to effectively reduce the unnecessary suffering and provides better protection for the victims of armed conflict.

Many of the fundamental principles and rules of international humanitarian law are customary in nature. Most of these rules are applicable in both international and non-international armed conflicts. For example, principles of distinction, proportionality, the notions of military objective, protection of the civilian population and precautions in the attack are found in customary law. According to International Committee of the Red Cross study spanning over ten years, it was established that there are one hundred and sixty one rules worldwide to be customary in nature. Out of those rules, one hundred and forty seven are applicable in non-international as well as international armed conflicts. Further these rules are binding on both sides to a conflict, whether government forces or rebel/insurgent groups. There are very good indications of the future development of international humanitarian law because treaty based international humanitarian law rules are ineffective upon non-international armed conflicts.

These customary rules of international humanitarian law are particularly important and relevant to South Asian region. This region has witnessed several armed conflicts and other situations of armed violence. Countries in this region also have a rather weak record of ratification of international humanitarian law treaties and only a few States have taken adequate steps necessary to implement their treaty based obligations into domestic law. The recognition and application of customary rules of international humanitarian law is, therefore, very important in order to regulate armed conflicts for many countries in this region. Customary rules of international humanitarian law can help fill the gaps for those countries currently engaged in non-international armed conflicts.

Treaty/Convention/Protocol based rules of international humanitarian law are more concrete and precise than customary rules as these are written rules and agreeable to countries. These are directly the sources of international humanitarian law. Currently, there are around hundred instruments on international humanitarian law. However, we would enumerate two dozen instruments for our purposes. On the protection of victims of armed conflict, the nine important instruments are: the four Geneva Conventions of 1949, Additional Protocol I of 1977, Additional Protocol II of 1977, Additional Protocol III of 2005, and Child Rights Convention of 1989, Optional Protocol to Child Rights Convention of 2009. On the protection of cultural property, the three main instruments are: Hague Convention of 1954, Hague Protocol of 1954,
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In South Asian region, India, Sri Lanka, Bangladesh, Pakistan, Maldives, Bhutan, and Nepal (all South Asian countries) are parties to the Four Geneva Conventions of 1949. Bangladesh and Maldives are parties to Additional Protocol to I and II of Geneva Conventions. No country in this region is party to the Third Additional Protocol of Geneva Convention. All South Asian region countries are parties to the Child Rights Convention. Except Pakistan, all South Asian region countries are parties to the Optional Protocol to Child Rights Convention. India, Sri Lanka, Bangladesh, and Pakistan are parties to Hague Convention. India, Bangladesh, and Pakistan are parties to 1954 Protocol to Hague Convention. No country of this region is party to 1999 Hague Protocol. India, Sri Lanka, Bangladesh, and Pakistan are parties to ENMOD Convention. Except Nepal, all are parties to Bacteriological Weapons Convention. Except Bhutan and Nepal, all are parties to Convention on Conventional Weapons (CWC). Same position remains with the First Protocol to CCW Convention. India, Sri Lanka, Bangladesh, and Pakistan are parties to Protocol II of CCW. India, Sri Lanka, Bangladesh, Pakistan, and Maldives are parties to Protocol III of CCW. Except Bhutan and Nepal, all countries are parties to Protocol IV to CCW. India and Pakistan are parties to Protocol V of CCW. All countries are parties to Chemical Weapons Convention. Bangladesh, Maldives, and Bhutan are parties to Ottawa
Apart from the customary rules of international humanitarian law and treaties, the resolutions passed by the General Assembly and Security Council of the United Nations might become the source of this branch of international law. In the case of Former Yugoslavia and Rwanda, the resolutions passed by the Security Council of the United Nations became the basis of administration of justice by International Criminal Tribunal for the Former Yugoslavia, and International Criminal Tribunal for Rwanda in 1993 and 1994 respectively. Although the resolutions passed by the General Assembly do not become the source of international humanitarian law directly, these may be the evidence of the practice of the countries in a particular situation. Thus, if you want to prove a customary practice of international humanitarian law before a court, you may adduce evidence of the resolutions passed by the General Assembly to prove the existence of a practice amounting to international custom. The Court may look into the fact that how the resolution in question was passed by the General Assembly. The conditions of voting may be very important to determine the strength of practice of the country. The factors (political, economic and security etc.) which influenced the voting in favor of the resolution may be an important question to decide the issue. Finally, it can be concluded that the resolutions of General Assembly may be an important tool to identify the source of international humanitarian law.

4.4 WHAT ARE THE NAMES OF IHL INSTRUMENTS?

The Geneva Convention for the Amelioration of the Conditions of Wounded and Sick in Armed Forces in the Field, 1949 (or, Geneva Convention I) protects wounded and sick soldiers during war. It contains sixty four articles. These articles provide protection not only for the wounded and sick, but also for medical and religious personnel, medical units and medical transports. The Convention also recognizes the distinctive emblems. It has two annexes containing a draft agreement relating to hospital zones and a model identity card for medical and religious personnel.

The Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 1949 (or, Geneva Convention II) protects wounded, sick and shipwrecked military personnel at sea during war. This Convention closely follows the provisions of the Geneva Convention I in structure and content. It has sixty three articles specifically applicable to war at sea. For example, it protects hospital ships. It has one annex containing a model identity card for medical and religious personnel.
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The Geneva Convention relative to the Treatment of Prisoners of War, 1949 (or, Geneva Convention III) applies to prisoners of war. It contains one hundred and forty-three articles. The categories of persons entitled to POW (Prisoners of War) status were broadened. The conditions and places of captivity were more precisely defined, particularly with regard to labor of POW, their financial resources, the relief they receive, and the judicial proceedings instituted against them. The Convention establishes the principle that POW shall be released and repatriated without delay after the cessation of active hostilities. The Convention has five annexes containing various model regulations and identity and other cards.

The Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 (or, Geneva Convention IV) affords protection to civilians, including in occupied territory. Before 1949, civilians were not protected from the effects of war by any treaty. Thus, this is an important advancement over the other treaties. This Convention is composed of one hundred and fifty-nine articles. The bulk of the Convention deals with the status and treatment of protected persons, distinguishing between the situation of foreigners on the territory of one of the parties to the conflicts and that of civilians in occupied territory. It spells out the obligations of the Occupying Power vis-à-vis the civilian population. It also contains provisions on humanitarian relief for populations in occupied territory. It also contains a specific regime for the treatment of civilian internees. It has three annexes containing a model agreement on hospital and safety zones, model regulations on humanitarian relief and model cards.

In the two decades that followed the adoption of the Geneva Conventions, the world witnessed an increase in the number of non-international armed conflicts and wars of national liberation. New methods of warfare, like guerilla warfare was adopted. In response, two Additional Protocols to the Geneva Conventions were adopted in 1977. Protocol I (Additional Protocol to the Geneva Conventions of 1949, relating to the Protection of Victims of International Armed Conflicts) strengthens the protection of victims of international armed conflicts whereas Protocol II (Additional Protocol II to the Geneva Conventions of 1949, relating to the Protection of Victims of Non-International Armed Conflicts) strengthens the protection of victims of non-international armed conflicts. Protocol II was the first ever international treaty devoted exclusively to situations of non-international armed conflicts. In 2005, Protocol III was also adopted. It creates an additional emblem, the Red Crystal, which has the same international status as the Red Cross and Red Crescent emblems.

The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 1925 (usually called the Geneva Gas Protocol) is a treaty prohibiting the first use of chemical and biological weapons. It entered into force on February 8, 1928. It prohibits the use of chemical and biological weapons, but has nothing to do with production, storage or transfer of these substances.

The Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and Their Destruction (also called BWC) prohibits not only the use of these weapons but also the development, production, stockpiling and acquisition of these weapons. This Convention supplements the Geneva Gas Protocol of 1925. This Convention entered into force on 26 March 1975.

The Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993 (also called CWC) bans the production, stockpiling and use of chemical weapons, like mustard agent and chloroacetophenone. The Convention on the Prohibition of Military and any other Hostile Use of Environmental Modification Techniques, 1976 (also called ENMOD) intends to nip in the bud the expansion of the conduct of hostilities using environmental modification techniques.

The Ottawa Treaty or the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel (AP) Mines and on their Destruction, 1997 completely bans all AP landmines. It has become effective from March 1999. Besides stopping the production and development of AP mines, a state party must destroy all AP mines in its possession within four years. However, mixed mines, anti-tank mines are not covered by this Convention. Finally, the Convention on Cluster Munitions (CCM), 2008 prohibits the use of cluster bombs, a type of explosive weapons which scatters bomblets over an area. This Convention is going to enter into operation from August 1, 2010.

The Rome Statute of International Criminal Court, 1998 has also come into operation since 2002. The Court has jurisdiction in four specific kinds of international crimes, viz., genocide, crimes against humanity, aggression, and war crimes. The Court has its seat at The Hague in Europe.

Self Assessment Question

1) What are the main instruments of International Humanitarian Law?


4.5 HOW HAS THE HAGUE LAW DEVELOPED?

You must know that the process of modern development of international humanitarian law started with the codification of already existing customary rules of warfare. This codification was started in the middle of nineteenth century with the conclusion of multilateral treaties. Two multilateral treaties of fundamental importance in the world of international humanitarian law were concluded: one at St. Petersburg (prohibiting the use of explosive rifle bullets) in 1868 and another at Geneva (relating to the protection of wounded soldiers on the battlefield) in 1864. These modest beginnings led to the emergence of two distinct trends in the law of armed conflict, namely The Hague Law (so named because of the conclusion of some treaties related to the area in The Hague Peace Conferences of 1899 & 1907) relating to the conduct of war
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proper and permissible means and methods of war; and The Geneva Law (so named because of the conclusion of a number of treaties related to the area in Geneva) relating to protection of victims of war.

The aim of the Hague Law has been to avoid unnecessary suffering and superfluous injury by regulating the use of certain means and methods of warfare. At the First Hague Peace Conference in 1899, four Conventions were adopted whereas at the Second Hague Peace Conference in 1907, 13 Conventions were adopted. Of these, the most important for the development of international humanitarian law was the Hague Convention No. IV of 1907 concerning the laws and customs of war on land. In this Convention, a very important principle is embodied, which is known as de Martens clause (the clause is so named after the name of a Russian jurist, Frederick de Martens). This principle lays down a great normative rule which states:

“In cases not covered by any other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience.”

This clause testifies to the completeness of humanitarian protection: in the absence of an explicit rule for a certain type of conduct, it may not be assumed that such conduct is permitted. On the contrary, a solution must be found on the basis of principles of humanity and the beauty of public conscience. This rule finds expression in all the four Geneva Conventions as well as in Article 1(2) of Additional Protocol I of 1977.

The major revision of The Hague Law was necessitated by the experience of World War I (1914-1919). The human civilization was particularly shocked by the use of poisonous gases during the war. In 1925, a Protocol was adopted for the prohibition of the use in war of asphyxiating, poisonous and other gases, and of bacteriological methods of warfare. The Protocol banned not only chemical means of warfare but even the bacteriological means of warfare.

The principles embodied in the Hague Convention and regulations on land warfare of 1899 & 1907 became widely accepted by the nation-states. By the time the Second World War broke out, these principles were regarded to be part of customary international law. Such a view was also endorsed by the International Military Tribunal at Nuremberg in its judgment on the conduct of the major war criminals participating in the Second World War. It was contended before the Military Tribunal that as Germany was not a party to Hague Convention of 1907, the provisions related to the conduct of war did not apply to it. Rejecting this contention, the Tribunal held that by the year of 1939, these rules laid down in the Convention were recognized by all nations, and were regarded as being declaratory of the laws and customs of war.

After the Second World War, the Hague Law on conduct in the war proper and on regulation of means and methods of warfare was further strengthened by adoption of Hague Convention of 1954 on the protection of cultural property. This Convention was supplemented by Hague Protocol of 1954. Thus, you can understand that the Hague Law developed until this time on its own, retaining its prominent traits.

The Geneva Law has developed since the adoption of a treaty in the year of 1864 for the protection of the sick and wounded combatants at war on land. This Treaty had only ten articles, but the long journey of codification of law on the protection of war victims began from Geneva. The journey started from Geneva because it was home to a famous figure known by his name, Henry Dunant. Dunant had seen himself with his naked eyes the full horrors of the battle between French and Austrian armed forces. He was so moved by the misery of the victims of war that he retired from his business activity and started working for the cause of victims of war. Out of his several efforts to protect the victims of war, one is very important. This proposal was to conclude a treaty by which the work of the relief societies to aid the army medical services in time of war should be facilitated. He was responsible for the establishment of International Committee of the Red Cross and for the conclusion of the 1864 Convention.

The Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field had three important features. Firstly, in war on land, military hospitals and ambulances would be recognized as neutrals. Secondly, hospital and ambulance personnel would have the benefit of the same neutrality when on duty. Thirdly, hospitals and ambulances would be distinguished by a uniform flag bearing a red cross on a white ground. This Convention was accepted in an exceedingly short time by all the then independent nation-states and by the United States in 1882.

The treaty of 1864 was revised and expanded in 1906 to encompass the sick and wounded, shipwrecked at sea, as warfare at sea became usual among countries. After this revision, the need was felt to again revise and expand the scope of treaty when the First World War (1914-1919) was over. This War had brought to light the need for better protection of the prisoners of war. So, the Convention on the Treatment of Prisoners of War was adopted in 1929 which imposed a categorical ban on reprisals against prisoners of war. In the year of 1929 again, another Convention was adopted in the form of a much improved treaty on the treatment of the wounded and sick on land.

The Law of Geneva was further developed after the spine-chilling experience of Second World War (1939-1945). Many deficiencies of the previous law of Geneva came to the limelight, most prominent of which were the absence of any legal protection of civilian population from the effects of war, and to provide some minimum rules to regulate ‘armed conflict not of an international character’ of the variety of Spanish Civil War. Against this backdrop, the three Conventions in force (one of 1907 and second of 1929) were substituted by new Conventions. Thus, in 1949, four Geneva Conventions were concluded dealing with the wounded and sick on land; the wounded and sick and shipwrecked at sea; prisoners of war; and protection of civilians. These four Geneva Conventions constitute the backbone of the whole law relating to protection of victims of war. Out of these four Conventions, one Convention is specially meant for the protection of civilians.

The special feature of all the four Conventions is that all these Conventions contain
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a common Article 3 which is applicable in armed conflict not of an international character. This Article contains a list of fundamental rules that the parties to the conflict are bound to apply as a minimum in the event of non-international armed conflicts. Thus, any party to an armed conflict cannot escape the obligations under the Geneva Conventions by arguing that the conflict in question is not of an international character as all the Conventions apply only upon international armed conflicts.

The Law of Geneva eventually, in part, gave rise to three categories of 'international crimes', namely, war crimes, crimes against peace, and crimes against humanity. These international crimes became a part of the law contained in the Charter of the International Military Tribunal at the Nuremberg established by the victorious powers at the end of the Second World War. This inclusion provided an opportunity to develop international criminal law, which was later concretized in the shape of Rome Statute of the International Criminal Court.

4.7 HOW HAVE THE HAGUE LAW AND THE GENEVA LAW MERGED INTO ONE?

The period after the year of 1949 witnessed violent armed conflicts. The main factors of such armed conflicts were: national liberation movements in Asia and Africa, guerilla warfare, development of new types of weapons, Vietnam War. The national liberation movements had resulted into violent struggles between the militarily weak and the militarily strong. The representatives of national liberation movements started believing that the struggle of national liberation movements should clearly come within the framework of international armed conflicts. The techniques of such national liberation movements also changed, and the name given to such warfare was ‘guerilla warfare’. New types of weapons were made and old were developed further. Weapons, like Nuclear, Chemical, and Biological weapons were developed further in a sophisticated way. The range of Ballistic Missiles was increased. The bitter experience of Vietnam War of 1959-1975, in which Agent Orange (a defoliant herbicide) was used in a massive scale, was being examined. Thus, a strong opinion was emerging that the basic rules on the means and methods of warfare should apply to all categories of weapons, namely, nuclear, biological, chemical, or conventional weapons, or any other category of weapons.

In the backdrop of these developments, it was felt that the rules of international humanitarian law separated by the Hague Law and the Geneva Law be merged into a single one with a better comprehensible set of rules. With this purpose in mind, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva from 1974 to 1977, adopted the two Protocols Additional to the Geneva Conventions on 8 June 1977. This Diplomatic Conference was attended by the representatives of 102 States and several national liberation movements. Additional Protocol I has brought together the laws of The Hague and Geneva by combining the rules on limits on the means and methods of warfare and protection of victims in an armed conflict into one. Thus, The Hague Law and Geneva Law have merged into one in the form of Additional Protocol I of 1977.

Additional Protocol I contains 102 Articles divided into six Parts. It has two annexes attached to it. Part I lays down general provisions. Part II lays down the rules on the protection of wounded, sick and shipwrecked. Part III lays down rules on the
methods and means of warfare and on combatant and prisoner-of-war status. Part IV lays down rules on the protection of civilian population. Part V lays down rules on the execution of the Conventions and of this Protocol. Part VI lays down final provisions. If you look into the provisions of Parts II, III, and IV, you would find that this Protocol I is really merger of The Hague Law and the Geneva Law.

The major concerns of international community are addressed in this Additional Protocol I. Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination are covered by the rules laid down in paragraph 4 of Article 1 of Additional Protocol I. The basic rules on the methods and means of warfare laid down in Article 35 provide that weapons, projectiles and material and methods of warfare must not cause superfluous injury or unnecessary suffering. These basic rules also prohibit employing methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment. In the subsequent units, you will learn that this Additional Protocol I defines many important terminologies of international humanitarian law which were not defined in the earlier instruments of law.

### 4.8 SUMMARY

- In this unit, we learnt the sources of international humanitarian law. The rules of customary international humanitarian law as compiled by the International Committee of the Red Cross are very significant. The various multilateral treaties, agreements, covenants, protocols, conventions are the direct sources of international humanitarian law. We know the names of various instruments on international humanitarian law, most important of which are the four Geneva Conventions of 1949 and the Additional Protocol I of 1977.

- Further, we discussed the development of The Hague Law which deal with the rules on the means and methods of warfare. It tries to emphasize that the choice of the parties to an armed conflict to adopt any means and methods of warfare time is not unlimited. The basic objective of this law is to avoid unnecessary and superfluous injury in an armed conflict. Injury must be intended to obtain military advantage, and not to cause unnecessary and superfluous injury.

We further discussed the development of Geneva Law which deals with the rules on the protection of victims of an armed conflict. In an armed conflict, the persons who have surrendered, or the persons who have become incapacitated due to injuries, sickness, or by wounds should not be killed or captured and tortured. Through the personal efforts of Henry Dunant and later by the institutional efforts by the International Committee of the Red Cross, the law of Geneva developed into the form of four Geneva Conventions of 1949. These four Geneva Conventions contain four hundred and twenty nine rules on the protection of wounded, sick, shipwrecked, prisoners-of-war, and the civilians.

- We also discussed the merger of these hitherto different branches of international humanitarian law into one. This merger is codified in the form of Additional Protocol I of 1977. It combines the rules on the means and methods of warfare and the protection of the victims of an armed conflict. This merger was necessitated because of the fact that the national liberation movements needed to be characterized as international armed conflicts, and two, that the new means and methods of warfare had developed after the Second World War.
4.9 TERMINAL QUESTIONS

1) What are the sources of international humanitarian law? Discuss with examples.

2) Enumerate the instruments of international humanitarian law. Explain their main features.

3) How have The Hague Law and the Geneva Law developed into separate areas? Has there been any attempt to merge these two developments into one?

4.10 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 4.3

2) Refer to Section 4.4

Terminal Questions

1) Refer to Section 4.3

2) Refer to Section 4.4

3) Refer to Section 4.5, 4.6, and 4.7

4.11 GLOSSARY

Geneva Law: The law on the protection of sick, wounded, shipwrecked, prisoners-of-war, and civilians.


4.12 REFERENCES AND SUGGESTED READINGS

1) V.S. Mani (ed.), Handbook of International Humanitarian Law (2007)

2) ICRC Website