International Humanitarian Law has become obsolete in today's world. Discuss.

New Security Challenges (919M1)

This essay will discuss whether International Humanitarian Law has become obsolete today. This essay will approach the topic from a critical perspective, with a view of International Humanitarian Law crippled by its inability to negotiate political struggle.

Introduction

There is no central canon of International Humanitarian Law (IHL), although there are key historical texts and agreements. This essay will discuss the most important documents, such as the Hague Conventions, the Geneva Conventions, and the Statute of Rome.

What conditions of today's world make International Humanitarian Law obsolete? Firstly, a shift in the character of international order from formal and organised conflict to informal and fluid conflict. The first and second Hague conventions deal primarily with war and its rules, and they make three main assumptions about the way that war is fought:

1. War is fought by professional armies of uniformed and identifiable soldiers, distinct from the civilian population.
2. War is fought on battlefields, bounded territories in which the violence is contained.
3. War is fought in an orderly and regulated manner, according to unwritten but commonly understood rules of engagement. Otherwise known as customary law.

However, each of these assumptions exposes a flaw in the application of the Hague conventions to conflict today. These assumptions will form the basis of criticism in this essay.

Balancing military innovation

The record of military innovation throughout history shows a constant process of disrupting the established rules of engagement. Each time a new weapon is introduced the rules change, and to some extent the development of formal codified texts of law can be read as a reaction to the cycle of innovation and disruption. Law then becomes an institutional response, retroactively pleading for a return to order and structure.

The first case to look at is the introduction of snipers and long-range rifles in the 18th Century. During the American war of Independence, anti-colonial militants used long rifles to snipe British soldiers from beyond the range of their muskets.[1] The British army was taken by surprise by this tactic and at the time it was disparaged it as 'unsporting.'[2] Subsequently when the ruling monarch George III tried to introduce snipers with Ferguson rifles into the ranks of the British army, the military top brass colluded to have the snipers disbanded.[3] Why? In part because they violated the rules of engagement; shooting at long range deprived the enemy their chance to fight back, and there's no justice in killing a defenceless enemy.

In a melee the opposing sides can see one another, they're physically close, and their survival depends to some extent depends on their swordsmanship. However, if a solider is shot from a far away hill, beyond their field of vision, no amount of individual skill or fitness could save them. It's easy to see why this was considered 'unfair' at the time – it set a precedent for the disproportionate exchange of violence. It was a violation of the principle of proportionality and military necessity. The institutional response from the British army was to seek a return to an equal balance of force.

However, this example is enlightening for a number of other reasons. Firstly it exposes the political position of the British army in relation to its mutinous colonies. It's important to highlight that in other colonies, the British army had no moral qualms about shooting a defenceless enemy.

In 1762, around a decade before the American War of Independence, the British navy assaulted the city of Manila, then the capital of the Spanish East Indes. According to a contemporaneous account by the British commander William Draper, the city was defended by 1000 Malays, who rushed at the invading British soldiers and “died like wild-beasts, gnawing on the bayonets.”[4] Once the city was captured, commander Draper negotiated with the Spanish city governor for an orderly transition of power which would see the Spanish officers recognised as prisoners of war. Meanwhile the British troops sacked the city, exacting their revenge on its belligerent inhabitants. The extent of the 'pillage, looting and raping' was disputed, but even the new British governor of the island acknowledged that it had occurred.[5]

The purpose of this example is to show that not only are the laws of war changeable, but they are also discriminatory and specific, as opposed to universal and . In this case the British and the Spanish both saw their skirmish in the Phillipines as a legal war, everything was done according to the rules; the British arrived, the Spanish surrendered, and they were treated with civility. Neither of the parties included the native/non-European population in their legal understanding. The Spanish were protected as the legitimate enemy, but the Malays had no such status, the rules of engagement simply did not apply to them.
This helps us understand the reluctance of British generals to disregard the rules of engagement in America. Rebellious Americans were not an indigenous Other, they were white colonials of European descent, therefore they were treated differently. In the context of the 18th Century, the customary laws of war varied for Europeans and non-Europeans. This contradiction highlights a flaw of International Humanitarian Law which carries on to this day. Specifically, the inability to resolve the universal idea implied in a *nomos* which applies to all of humanity in all nations.

Kantian universalism, from which the main canon of humanitarian law derives its ideological direction, denies the nature of war as a political struggle. In the 'tradition of the *Jus Publicum Europaeum*'[6] there can be no humanitarian justification for war, at least not among European publics. Beyond the right to self-defence, no state in the state of nature which comprises the international arena can claim its war to be just.[7] Instead, in the *Jus Publicum Europaeum*, war exists only between elites, while the masses (in lieu of a proletariat) sit passive on the sidelines. It assumes a neutral public who have no interest in which ruling family sits on the throne. Without the mobilisation of society in a total war, any conflict is limited. If the function of war is only to serve as 'diplomacy by other means', then conflict need only exist on the level of isolated state institutions, without escalating to real enmity between peoples.

In this situation Carl Schmitt provides the useful analogy of war as a duel. It frames the theoretical perspective which underpins International Humanitarian Law. In a duel neither the victor nor the vanquished are recognised as fighting a just cause, there's no moral dimension to the fight. The duel also follows a procedure, the duellists have rules to ensure a fair fight, and the fight is observed by a neutral third party.

According to Schmitt:

> *"… a challenge to a duel was neither aggression nor a crime, any more than was a declaration of war. Pursuing either one or the other in no sense made one an aggressor. In its ideal form, this also was true of internal European wars between states in European international law, in which neutral states functioned as impartial observers"*[8]

Here the statutes of International Humanitarian Law play the part of ordering war-as-diplomacy. In a normative world, relations between states degenerate to the point where two or more states declare war on one another, armies clash, then after some fighting, one side surrenders, a peace treaty is drawn up and peaceful relations resume anew. Meanwhile the international community monitors the conflict as a neutral observer. This is not how wars are fought today.

Measures to protect civilians and wounded non-combatants are credible when warring armies consider each other neutral opponents. What International Humanitarian Law cannot account for is a war between true enemies, whose combat is an existential struggle predicated on the complete defeat of the enemy. Humanitarian law cannot account for war-as-politics. In such a war the universal laws of humanitarian conduct are over-ridden by the polarising nature of the fight.

The introduction of politics here refers to concrete antagonisms, which grow more political as they get more extreme.[9] Politics implies the unification of a public into an entity, an exclusive entity whose exclusivity defines it in opposition to an other, enemy, public. A political war cannot be conducted in adherence with universal human values because it is by its nature the antithesis of universalism.

Fissures between humanitarianism and *raison d'État* in the process of international codification

Even within the first movements to create codified documents of humanitarian law we see that its universal aspirations are undermined by a distinction between the European public and the enemy Other. One of the debates at the Hague Convention of 1899 centred around expanding bullets, otherwise known as dum-dum rounds. These bullets were designed to cause more severe injury than normal rounds. The German delegation's argument for banning expanding bullets was that once a soldier has been injured, they are out of the fight, and therefore don't need to be killed or wounded unnecessarily.

Britain had already agreed on this argument in principle when it signed the St Petersburg declaration of 1868. This declaration banned the use of exploding bullets, which had the same functional effect of killing, rather than merely wounding, a victim.[10] However, at the Hague Convention in 1899 the British delegation reserved the right to use dum-dum rounds. They argued that unlike European soldiers, 'uncivilised' barbarians would carry on fighting despite their wounds, hence the need for more deadly bullets.[11] Crucially, Britain had no objection to banning dum-dum rounds specifically in Europe, but defended their use in the periphery. Later on in 1906, when suppressing the Bambatha rebellion in South Africa, the British army made 'extensive use' of dum-dum rounds against Zulu rebels.[12] Similarly, the USA intended to use dum-dum rounds in its invasion of the Philippines, and therefore in 1899 the US delegation also voted against a universal ban on the rounds.[13]

There was no vision of universal humanity in the position of Britain and the USA towards humanitarian law. They sought order only for the western public, considering the rest of the world a sphere of lawlessness. Their approach betrayed a selective perspective, where international law did not reach beyond the confines of western civilisation. This is a crisis at the heart of humanitarianism as without overcoming the political divisions established by modern nation-states it's impossible to conceive of justice for all humans.

Barbara Tuchman is also critical about the motivations of Russia and Britain at the Hague Convention of 1907. The second convention was an opportunity to defuse a coming naval arms race, and Britain's liberal government enthusiastically championed disarmament while simultaneously commissioning a new generation of three new dreadnoughts.[14] Russia was happy to propose the convention and write the agenda so long as discussion on the conduct of war could divert attention away from the question of disarmament.[15] In each of these conventions, the motivations of the participant states were not born out of a genuine desire for universal human liberty but a narrow calculation of *raison d'État*.

Enforcing universal laws in an unstable world

Having dealt with the historical fundamentals of International Humanitarian Law, now it's time to look at its most recent development – the creation of the International Criminal Court.

The ICC suffers from the same original sin as its predecessors in assuming a post-political model of war. The Rome Statute was drawn up in the aftermath of the Cold War, in the context of growing neo-liberal hegemony and a unipolar order revolving around the USA and its patrons.

While careful not to place itself above the authority of states, the Rome Statute authorises the International Criminal Court to act in cases where a signatory state is “unwilling or unable genuinely to carry out the investigation or prosecution.”[16] This appears as a measure to overcome the problem of the political, to bypass the authority of the state when humanity is threatened. Nevertheless, in sanctifying action without the consent of a dissenting state, humanitarian law sets itself up as an instrument by which states can intervene in the affairs of their neighbours and be morally justified in doing so. Again, while careful to respect state sovereignty, the Responsibility to Protect doctrine agreed by the United Nations in 2005 nevertheless leaves open the possibility that action could be sanctioned against irresponsible states.

Here IHL hits a dead-end, because without the ability to physically intervene it remains a reactionary process. It can only act long after a war crime has been committed. However, the process of 'humanitarian intervention' often obscures the more realist motives of state relations.

The latter half of the 20th Century also saw the rise of the humanitarian intervention. In 1975 Vietnam intervened in what was then Democratic Kampuchea, cutting short the Khmer Rouge genocide. Then in 1979 the Soviet Union intervened in Afghanistan to support the democratically-elected PDP government against the Taliban.
These wars were justified at the time not only in the cause of the 3rd world proletariat, but in the name of human rights. The right to education,[17] right to equality before the law and protection from religious or sexual discrimination,[18] the right to participate in government.[19] However, it's also impossible to review those interventions today without placing them in the geopolitical context of the Cold War.

If we seek out the parallel motivations for intervention we clearly see that there's no such thing as a neutral intervention. The very claim of a humanitarian intervention is to invoke the circular logic of a war against war.[20]

When France contributed troops to NATO's war in Afghanistan, they were deployed on the grounds of internationalising the values of the French Republic – universal human rights. The professed mission of French soldiers was to secure women's rights, the right to education, the rights of ethnic minorities, freedom of speech, etc. all of which was under threat from Islamic government. Of course, these values ran parallel to other more practical motives around securing resources and contracts for French companies. We also see the same humanitarian values invoked in wildly different geopolitical contexts, such as the Russian intervention in Syria. The logic of anti-terrorism, protecting the rights of religious minorities (in Russia and France this is especially salient for persecuted Christian communities), upholding the rule of law. Regardless of its appropriateness in the Syrian situation we cannot fail to recognise that the language of humanitarianism is empty.

Also like the Hague conventions which came before it, the International Criminal Court has also been unable to come to terms with its political environment. When Russia revoked its obligations under the Rome Statute in 2016, the Russian Ministry of Foreign Affairs set out its criticism. The ministry claimed that the court had failed to become fully independent and was *"ineffective and one-sided."*[21] Responding to an ICC report on Ukraine and Crimea a ministry spokesperson went on to state that the court had *"lost its status as an objective and impartial instrument of international justice."*[22]

To some extent the Russian withdrawal could be explained as a preventative measure to protect representatives of the Russian state from prosecution. However, their argument for withdrawal nonetheless relies on exposing the flaws in its neutrality. The accusation of bias also has some substance to it in consideration of the fact that of all the people indicted by the ICC, all of them were indicted in connection with crimes in Africa. Two African heads of state – Laurent Gbagbo of the Ivory Coast and Muammar Gaddafi of Libya were both indicted shortly after losing control of their country in successful rebellions against their government. In both Libya and the Ivory Coast the rebel opposition enjoyed political and military support from France, among other European powers. The ICC position here is controversial because alongside its mandate to prosecute war crimes, it also became an accessory to regime-change efforts in Africa. It's partly due to this perception of bias that three African states – South Africa, Burundi, and Gambia, recently announced their intention to withdraw from the Rome Statute.[23]

In Britain there is an ongoing campaign to have Tony Blair tried for violations of IHL associated with the Iraq war,[24] yet the British justice system refuses to bring him to assize. This would be an ideal situation for involving the ICC. Consider the situation if the ICC would seek to arrest Tony Blair. The British government would likely protect him, and Britain is an influential country with powerful allies, the ICC would face strong international opposition. If Tony Blair were referred to the ICC by the UN Security Council the move would be swiftly vetoed by the US. Tony Blair is invulnerable. Now consider Laurent Gbagbo, since he's out of power he cannot turn to the new government to protect him, and his supporters have little influence domestically let alone internationally, he is vulnerable. The purpose of this hypothetical is to highlight how political constraints are reflected in the actions of the ICC. The fact that it has only ever issued indictments over war crimes in Africa is an indication of bias, and that bias only compounds the contradiction between the humanitarian aspirations of the ICC and their practical application in a fractious world system. The ICC has to navigate an uneven distribution of power and political influence across the globe which hinders it from acting in the universal cause of all humanity.

Lastly, if we return to the relationship of politics to the breakdown of divisions between society, the state and the military. Wars are not fought by soldiers alone, they require a complex support network of administrators, cooks, drivers, mechanics, etc. Wars are a collective endeavour, yet the ICC holds named individuals responsible for war crimes. This precludes the reality that any atrocities on a mass scale require a level of organisation which no single individual could carry out on their own. The generals and leaders who deliver orders would be powerless without the conscious participation, whether willing or unwilling, of a wider circle of people to enact their commands. So the last complication to the ICC caused by politics is the task of condemning crimes committed by society as a whole.

Difficulties in policing modern warfare

It's also useful to ask again about the purpose of International Humanitarian Law. At first it seeks to protect civilians, this goal at least is clear even if the definition of civilian is not. Beyond that it also seeks to protect soldiers to some degree by restricting the most inhumane methods of war.

The obvious dilemma emerges where there's no objective standard of humanity against which violence can be judged. The degree to which violence is humane or inhumane is subjective and defined only within the confines of the law. This creates areas of ambiguity in the gap between legitimate and illegitimate violence where the form and the extent of the killing are the same but the methods differ. Sultan Ahmed highlights this well in his description of the suicide bomb as a 'poor man's F-16.'[25] He uses it in the context of the Palestinian conflict to challenge the differing perceptions of legitimacy applied to both the Israeli military and its Palestinian opponents. An Israeli pilot in an F-16 is understood as a soldier, subject to both protection and prosecution under IHL. On the other side, a Palestinian in a suicide vest is understood by Israel not as a soldier but as a terrorist and therefore not subject to the laws of war. This is a deficiency of IHL which complicates its application to conflicts of today.

In 2003 the UN Security Council referred to terrorism as a problem which can be solved by a combination of human rights law and IHL.[26] This combination of IHL and human rights is important because although both branches of law apply to humanity as a whole, they are each tailored to military and civilian affairs respectively. The overlapping of the two reflects the way in which modern warfare violates the first two assumptions of IHL: firstly the distinction between civilians and soldiers, and secondly enclosure of the battlefield.

Mary Kaldor *et al* describe the conditions of 'New Wars' in opposition to 'Old Wars' as follows:

> *“New wars [..] take place in the context of failing states, where borders become increasingly irrelevant. They are fought by networks of state and non-state actors, where out-and-out battles are rare and violence is directed mainly against civilians or symbols of order.”*[27]

As it was set out in the beginning of this essay, IHL was designed for old wars, not new ones. The principle assumptions of IHL are far less certain in new wars, which often blur the distinction between civilian and soldier, and erase the tight boundaries of the battlefield. The result is fluid de-territorial violence which brings together all of society in the fray.

In the New War, the battlefield merges with civilian areas, leading to much higher civilian casualty counts than the Old Wars pitched on distant battlegrounds. New Wars are modern, urbanised, and involve the whole community. The area of ambiguity between legitimate and illegitimate violence becomes more important now because that's the area in which most of the violence occurs. The question of what form of violence is humane or inhumane enough to warrant regulation is not left open to interpretation; only specific weapons (eg. chemical weapons) and practices (eg. torture) are

addressed in IHL. This again poses a dilemma for IHL because it becomes irrelevant to the real manner in which war is conducted.

Take for example the US airstrike on a 'Doctors Without Borders' hospital in Afghanistan in 2015, which killed 10 patients and 12 hospital staff. The US military initially referred to the attack as 'collateral damage,'[28] and made clear that they did not intend to bomb the hospital. This is useful as it allows us to identify the features of New War which made it possible for the US to accidentally commit a war crime. Insurgent fighters were operating in the area around the hospital, the US AC-130 plane was flying high above its target and the gunner didn't scrutinise it closely enough. Mistakes do happen in wars and this was one of them, but the argument here is that the conditions in which those mistakes occur are the very same conditions which define modern warfare; namely the blurring of the boundary between civilian and soldier, and the blurring of the battlefield territory.

New innovations in military technology allow soldiers to participate in a conflict from locations far removed from the actual application of violence. For example, the introduction of long-range mobile artillery in the late 19th Century posed an ethical dilemma similar to that faced today by operators of remote-controlled drones. A soldier firing a shell or a rocket at a faraway enemy might not see it land, or they might only see the result through the small lens of a telescope. The soldier wouldn't experience the consequence of their actions up close, where the violence is visceral and personal. As the example of the Doctors Without Borders airstrike shows, the physical dislocation of the battlefield introduces issues of accountability. There is a grammar to war, a language by which both sides communicate; the staff at the hospital tried to telephone their contacts in the US military to tell them to stop the attack, but they were unsuccessful. If they had been attacked by US troops in person they might have been able to hoist a white flag and through communication the mistake would have been avoided.

Taliban fighters in Afghanistan cannot easily shoot down American planes, they have little means of retaliation when attacked. Furthermore, once a plane is headed their way they have no opportunity to exit the conflict in a negotiated surrender. This isolation of the participants of war is particularly true for drones, whose pilots will always remain physically unharmed even if their craft can be destroyed. A drone pilot is completely removed from the physical consequences of their actions, and where military innovations tip the balance of proportional violence too far, it becomes the role of IHL to step in and retroactively restore order. Until now there's been little movement to regulate the use of drones and IHL is being overtaken by military innovations which repeatedly disrupt the laws of war.

The question of the partisan

In a discussion with Mary Kaldor, Michael Howard makes the following assertion about the civil-military distinction:

> *"There had been a great distinction between the civil and the military during the 18th and the early part of the 19th Centuries, but with the French revolutionary wars, virtually everybody whether they were in uniform or not began to see themselves as part of the war effort."*[29]

Howard connects civilian involvement in warfare with the general civilian involvement in the affairs of state. If we see the development of the modern state tied to its capacity for warfare,[30] when the state moves into the public realm, so too does the public become involved in warfare. This presupposes that war has an explicitly political dimension which makes it impossible to regulate in a detached, impartial way.

The most stark conundrum for IHL with relation to civilians is the question of the partisan. A partisan is someone who can be identified both as a soldier and as a civilian, it's an uncomfortable category because it's changeable dependent on the situation. How can we classify a civilian who does not fight day-to-day, but nonetheless possesses a weapon and will use it when the opportunity arises. It's another ambiguous area which IHL has difficulty dealing with. The problem of the partisan first came up in the 1899 Hague conference,[31] where the most powerful countries argued that spontaneous armed resistance on occupied territory could not be recognised as legitimate military action. Thus partisans were initially excluded from the rights and responsibilities under IHL which would otherwise be associated with professional soldiers. The third Geneva Convention on the treatment prisoners of war does cover partisans, provided they meet four conditions:

1. Commanded by a person responsible for his subordinates.
2. Having a fixed distinctive sign recognizable at a distance.
3. Carrying arms openly.
4. Conducting their operations in accordance with the laws and customs of war.[32]

This definition is problematic considering that not all partisans necessarily meet those conditions. A partisan might avoid openly carrying arms or wearing distinctive symbols to mark themselves out, because partisan warfare implies a degree of secrecy. We could take this further to point out that a partisan openly carrying a weapon, organised in a group structure, and holding a fixed sign which identifies them, would be no different from a regular soldier.

Where partisans cannot meet the conditions of the Geneva Convention they effectively become outlaws, since they operate outside the framework of IHL. This is where new notions of terrorism and human rights law encroach upon the legal space vacated by IHL. For example, since 2002 the USA has incarcerated its enemy partisans in the Guantanamo Bay prison camp. From the US perspective its prisoners are not prisoners of war but enemy combatants to be tried under charges of terrorism. The legal defence of those prisoners doesn't rest on their rights as (alleged) participants in a conflict but on their human rights and their status in relation to criminal justice charges. Despite this the fact remains that Guantanamo Bay is not a regular civilian prison but a navy base under the control of the US military. So, the partisan's association with war prompts the state to treat them differently from normal criminals, yet they cannot rely on IHL to protect them as legitimate participants in a war.

A similar situation emerged in Northern Ireland during the Troubles in the early 1970s, following the establishment of military internment camps and Diplock courts for suspected republican partisans. The British legal system sanctioned detention without trial, and then trial without jury, on the justification that the civilian legal apparatus was inadequate for dealing with partisans. In this way partisans were denied their legal status as civilians as well as their legal status as soldiers at war with the state. The contradictions of this situation come into sharp focus if we consider that, at the beginning of the internment operation, the army had no authority to arrest or detain citizens, and so the actions of the military had no grounding in British civilian law.

What we learn from both Britain and the USA is that the deficiencies in defining parties to a conflict can be taken advantage of by the state to deny legitimacy to its enemies. The inability to correctly identify partisans leaves the state free to create special or exceptional categories which serve only its interests. As a result partisans are faced with a difficult choice: if the partisan openly identifies themselves they become a vulnerable target for better-armed and better-organised military forces. Meanwhile if the partisan chooses to remain hidden, the state is free to declare them an outlaw and prosecute them beyond the confines of the law.

Ultimately the question of the partisan is a question for a New War. Partisan warfare is characteristic of the dispersed, although no less organised, violence which resonates through urban insurgencies. The concentration of International Humanitarian Law on formal and identifiable soldiers makes it irrelevant to states which rely on paramilitaries and proxy forces to achieve goals unattainable by the regulated military.

Conclusion

In conclusion, International Humanitarian Law was initially rooted in an Eurocentric perspective. The founders of IHL wanted only order within Europe, and this extends to an unrealistic model of conflict which doesn't take into account the political nature of modern warfare, or the relationship between society and conflict. Humanitarian approaches cannot overcome the national interest ever present in the process of creating and interpreting IHL. The enforcement of humanitarianism follows geopolitical fault lines which focus excessively on crimes committed in Africa and to some extent leave a Eurocentric perspective intact. New Wars challenge the assumptions of IHL and expose grey areas where the law has fallen behind reality. The role of the partisan is the most important grey area between civilians and soldiers and IHL has so far been unable to tackle the ambiguity.

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