UNIT 5 WHAT IS LAW OF ARMED
CONFLICT AND LAW
DURING ARMED CONFLICT?

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5.1 INTRODUCTION

International humanitarian law is a set of rules which seek for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or no longer participating in the hostilities and restricts the means and methods of warfare. It differs from human rights as it is applicable only in times of armed conflicts. Though international humanitarian law mainly consists of provisions for protection of the wounded combatants, the sick, the civilian population trapped in the international and non-international armed conflicts there are certain conventions and declarations protecting the immovable cultural property and environment during such acts of violence.

Now let us consider the protection of cultural property under the international humanitarian law in such situations.

International humanitarian law is the law of armed conflict or the law of war comprising of Geneva Conventions, Hague Conventions and various treaties and customary law. It defines and regulates the relations between the states engaged in war, neutral states and the individuals as well. It provides rules for the protection of persons and property during armed conflict.

International humanitarian law is applicable in international armed conflicts. The international law of peace existing between the states concerned will thus largely be superseded by the rules of international humanitarian law. Traditional international law was based upon a rigid distinction between the state of peace and the state of war, there was no intermediate state, although there were cases in which it was difficult to tell whether the transition to a state of war had been made. So long as two countries were at peace, the law of peace- the normal rules of international law
What are the Basic Concepts of IHL?

governed relations between them. Once they entered a state of war, the law of peace ceased to apply between them and their relations with one another became subject to the law of war, while their relations with other states not party to the conflict became governed by the law of neutrality. While the matter was not free from doubt, it was generally thought that a state of war came into existence between two countries if, one of these countries made it clear that it regarded itself as being in the state of war.

No such clear picture can be discerned today. Since 1945 countries have rarely regarded themselves as being in a formal state of war and international humanitarian law now becomes applicable as soon as there is an international armed conflict. Nevertheless, there is no sharp dichotomy between peace and armed conflict in international law such as used to exist between peace and war. A state of war usually presumed a complete rupture of normal relations between the parties. Today, the outbreak of an armed conflict between two countries will not necessarily mean that all non-hostile relations between them cease. Thus, diplomatic relations between the parties will not necessarily be terminated or suspended.

Although the United Kingdom broke off diplomatic relations with Argentina at the start of the Falklands conflict, and most of the states which took part in the conflict with Iraq in 1991 withdrew their diplomatic relations were not severed. China and India did not sever diplomatic missions and required Iraq to do likewise, there have been cases in which diplomatic relations were not severed. China and India did not sever diplomatic relations during their 1962 border conflict, nor did India and Pakistan in 1965, and Iran and Iraq continued to have diplomatic representatives in each other’s capitals long after the outbreak of the Iran-Iraq War. Similarly, the parties may continue with arbitration proceedings, as India and Pakistan did in the Rann of Kutch arbitration in 1965, or with proceedings in the ICJ, as in the Burkina Faso/Mali boundary dispute.

The outbreak of an armed conflict between the states will lead to many of the rules of the ordinary law of peace being superseded, as between the parties to the conflict, by the rules of the humanitarian law. For example, if one state detains nationals of the other, it must do so in accordance with either Third or Fourth Geneva Convention, depending upon the status of the person concerned; the rights of the states to seize one another’s property and to use force against each other will become materially different. Nevertheless, the law of peace does not cease to be applicable. In matters not regulated by humanitarian law, it will continue to apply. Thus, the treaty relations between the parties, their diplomatic relations (if any), and certain aspects of their treatment of each other’s citizens will continue to be regulated by the law of peace, even if that law makes allowance for abnormal conditions between the states concerned. The greater the extent to which the parties maintain non-hostile relations (a feature of a surprising number of armed conflicts), the more important the law of peace will be.

5.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the principle of prohibition of force;
- discuss when does an Armed Conflict Starts?;
- discuss when the right to ‘Self Defence’ can be exercised?; and
- explain the concept of ‘Just War’?
This is the case of Article 2(4) of the Charter of the United Nations, which expressly prohibits a state’s threat to use armed force against another state\(^1\), regardless of whether or not the threatened use of force eventually materializes. The starting point of any discussion of *jus in bello* is the means offered to the states under contemporary international law for the peaceful settlement of conflict without recourse to the use of force. The charter of the United Nations prohibit the war, it even prohibit the threat to use force against the territorial integrity or political independence of any state. States are to settle their differences in all circumstances by peaceful means. A state which attempts to use of force against another state to achieve its ends contravenes international law and commits an aggressive act, even when it is apparently in the right.

The UN charter does not, however, impair the right of a state to resort to force in the exercise of its right to self defence. The same holds true for third party states who come to the aid of the state being attacked (right of collective self defence). Finally, the United Nations may order military or non-military action to restore peace.

**Prohibition of war and International Humanitarian Law**

The war is prohibited under existing international law, with the exception of the right of every state to defend itself against attack.

The fact that international humanitarian law deals with war does not mean that it lays open to doubt the general prohibition of war. The preamble to Additional Protocol I to the Geneva Conventions outs the relationship between the prohibition of war and international humanitarian law as follows:

"Proclaiming their earnest wish to see peace prevail among peoples, recalling that every state has the duty, in conformity with the charter of the United Nations, to refrain in its international relations from the threat or use of force....,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application, measures intended to reinforce their application. Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12th August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations..."

\(^1\) Apart from Article 2(4) of the UN Charter, the prohibition of the threat of force in international relations is included in Article 301 of the 1982 UN Convention on the Law of the Sea, Article 3(2) of the 1979 Moon Treaty, Article 1 of the 1947 Inter-American Treaty of Reciprocal Assistance, Article 1 of the 1948 Inter-American Treaty on the Pacific Settlement of Disputes (Pact of Bogotá), Article 1 of the 1949 North Atlantic Treaty, Article 1 of the now defunct 1955 Warsaw Pact, Article 1 of the 1954 Manila Pact establishing the Southeast Asia Treaty Organization, Article II of the 1972 Charter of the Organization of the Islamic Conference, Article 1 of the 1978 Protocol on Non-Aggression additional to the 1975 ECOWAS Treaty, Article 1 of the 1951 Security Treaty between Australia, New Zealand and the United States, Article 2 of the 2002 Charter of the Shanghai Cooperation Organization, Article 4 of the 2002 Constitutive Act of the African Union, and in the seventh preambular paragraph of the 1998 Rome Statute of the International Criminal Court (ICC). Article 19 of the Charter of the Organization of the American States (OAS) also contains the prohibition under examination, although it is differently worded and covers any 'attempted threat against the personality of the State or against its political, economic, and cultural elements'.
What are the Basic Concepts of IHL?

International humanitarian law quite simply stands mute on whether a state may or may not have recourse to the use of force. It does not itself prohibit war, rather it refers the question of the right to resort to force to the constitution of the international committee of States as contained in the United Nations Charter. International Humanitarian Law quite simply stands mute on whether a State may or may not have recourse to the use of force. It does not itself prohibit war, rather it refers the question of the right to resort to force to the Constitution of the International community of States as contained in the United Nations Charter. International Humanitarian Law acts on another plane: it is applicable whenever an armed conflict actually breaks out, no matter for what reason. Only facts matter; the reasons for the fighting are of no interest. In other words, international humanitarian law is ready to step in, the prohibition of the use of force notwithstanding, whatever war breaks out, whether or not there is any justification for that war.

A look at the recent past and at the present reveals how often war has been waged between states— even though international law prohibits the use of force. The following situations have arisen:

i) One state attack another: it has committees a forbidden act of aggression against another state.

ii) A State defends itself against an aggressor, exercising its right of self-defence. It can be backed by a third state (collective self-defence).

The UN can decide on collective armed action when a member, in breach of its duty under the UN Charter, threatens or breaches the peace or commits an act of aggression.

When an Armed Conflict Occurs

An Armed conflict can occur inside a country. It is then known as civil war. Since this is considered to be an internal State matter, the general prohibition of war does not cover what is often the especially bloody fighting of civil wars. Clearly, therefore, international humanitarian law is also an essential part of the order of peace as set forth in the charter of the United Nations. The international community cannot, therefore, allow itself to neglect international humanitarian law.

International humanitarian law is a part of universal international law whose purpose is to forge and ensure peaceful relations between peoples. It makes a substantial contribution to the maintenance of peace in that it promotes humanity in time of war. It aims to prevent or at least to hinder mankind's decline to a state of complete barbarity. From this point of view, respect for international humanitarian law helps lay the foundations on which a peaceful settlement can be built once the conflict is over.

The chances for a lasting peace are much better if a feeling of mutual trust can be maintained between the belligerents during the war. By respecting the basic rights and dignity of man, the belligerents help maintain that trust. Once it is clear, moreover, that international humanitarian law helps pave the road to peace, no further proof of its legitimacy required.

5.3.1 Distinction between the Threat of Force and Threats to the Peace

Threats of force under Article 2(4) must also be distinguished from threats to the peace under Article 39 of the UN Charter. A threat of force can well be qualified
as a threat to the peace by the Security Council, since it is likely to escalate into actual use of force. However, the ‘threat to the peace’ concept is much broader and is not necessarily linked to a use of force or even to a violation of international law. The Security Council could also decide that a threat of force does not amount to a threat to the peace: for instance, in December 1963 Turkey threatened to use force against Cyprus and to invade the island if the rights of Turkish Cypriots were not safeguarded. Warships and aircraft were also sent off the coasts of Northern Cyprus. The situation was described by the Security Council as ‘likely to threaten international peace and security’, but not as an actual threat to the peace. Only when Turkey actually invaded the island in 1974 was the situation qualified by the Security Council as a threat to international peace. Although the threat of force permeates the relations among states, it has been an issue largely neglected by international lawyers. This is so especially if compared to the almost endless literature on the use of force. This paucity of scientific interest has mainly two reasons: the (false) assumption that only very rarely do threats of force meet any reaction by the international community, because in most cases they are absorbed by the subsequent use of force; and their often oblique and veiled character, which makes it difficult to detect them (but which does not necessarily render them less effective). A purely ‘positivist’ approach to the problem, which considers the threat of the use of force either lawful or unlawful once and for all, is not helpful, since it does not take adequately into account the function of the threat and its role as a ‘ritualized substitute for violence’. Indeed, threats of force are ‘an effort to use military power so that otherwise unobtainable goals may be reached without actually fighting’. Therefore, one should first ask if and how the threat of force under certain circumstances can contribute to the primary purpose of international law, i.e., maintaining a minimum world order; and second, if in such a case the threat is accepted by the international community at least as legitimate, if not as legal. This unit will try to examine threats of force by adopting a ‘functionalist’ approach, i.e., by taking into account their function and consequences, as well as the purposes pursued by the threatener.

5.4 DOES THE APPLICATION OF IHL DEPENDENT ON A FORMAL DECLARATION OF WAR?

The International Humanitarian Law now becomes applicable in any international armed conflict, whether or not a state of war exists between the parties. It follows that declarations of war have become almost unknown since 1945. There are no cases of a formal declaration of war having been delivered by one state to another through diplomatic channels. In most cases the parties to a conflict have denied that they were in a state of war. They have, however, been in cases in which states have expressed the view, by means other than a formal declaration, that they regarded themselves as being at war. Thus in both 1948 and 1967, a number of Arab states made explicit statements to the effect that they were at war with Israel, and similar statements were made by Iran and Iraq during the 1980-1988 Iran-Iraq War, as well as by Pakistan during its 1965 conflict with India.

Only if a statement that a country is at war was clearly intended to create a state of war, in full legal sense, will it be taken to have that effect. On that basis, it has

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2 It has sometimes been suggested that an attempt, by whatever means, to create state of war today would be ineffective because the legal concept of war is incompatible with the UN charter.
been said that a radio broadcast by the President of Pakistan in 1965 in which he stated that Pakistan was at war with India was not sufficiently unequivocal to create a state of war in the legal sense\(^1\).

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**Self Assessment Question**

1) When do you understand by the International Armed Conflict? When Does an Armed Conflict start?

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5.5 RIGHT OF AN INDIVIDUAL OR A COLLECTIVE SELF-DEFENCE

Unlike Article 2(4) and Article 39, Article 51 of the UN Charter makes no reference to 'threats' and submits the right to self-defence to the existence of an armed attack: it appears, then, that states facing a threat of force could react coercively only with the authorization of the Security Council. The ILC also stressed that a threat of aggression does not allow a threatened state to resort to force in self-defence under Article 51, and this view has been shared by several states. The exercise of the right of self defence preserved by Article 51\(^4\) of the UN Charter is not connected to a declaration of war or to the exercise of a state of war. Thus, in the Falklands conflict, the Britisher Foreign Secretary told the House of Commons that the United Kingdom was not at war with Argentina but was exercising the right of self-defence recognized by Article 51 of the Charter. It has already been suggested that a country which does not declare war does not thereby increase its right to use force by way of self defence, the right of self defence remains the legal basis for its actions and the country continues to be subject to the limitations which stem for the right of self defence, in particular the requirements that measures taken be necessary and proportionate, irrespective of whether it declares war. Nor will a declaration war by the aggressor in an armed conflict alter the fact that the legal basis for the use of force by the victim of that aggression is the right of self defence. A declaration of war by the aggressor does, however, imply that the aggressor is committed to the destruction of his adversary and this will obviously be a relevant factor in determining what a proportionate response is.

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\(^1\) The announcement in December 1989 by General Noriega, the de facto Head of State of Panama, that Panama was in a state of war with the United States should probably be considered in the same light.

\(^4\) Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
5.5.1 IHL does not require recognition from the parties to conflict

The applicability of the rules of international humanitarian law is not dependent upon whether the parties to a conflict recognize one another. Throughout the Arab Israel conflict, the Arab states have not recognized Israel as a state, yet both sides in that conflict have accepted the applicability of international humanitarian law.

The question of whether the parties to an armed conflict are states is objective and not a matter to be determined by the subjective recognition policies of each party. Where, however, there is real doubt about whether one side in a conflict is a state, rather than a secessionist movement within the rival party, recognition by other states may have an important evidential effect.

Self Assessment Question

2) When a State or an Individual can take Self Defence under Article 51 of the UN?

5.6 JUST WAR

Throughout history, whenever States and peoples have taken up arms, they have affirmed that they were doing so for a just cause. All too often, this has been used as an argument to refuse mercy to their opponents and to justify the worst atrocities. The enemy was accused of serving an unjust cause and was held responsible for the privation, suffering and bereavement that every war leaves in its wake. Defeat was sufficient proof of guilt and the conquered, whatever their number, could be massacred or enslaved. "Holy wars", "crusades", "just wars": History shows that the belligerents who are loudest in proclaiming the sanctity of their cause are often guilty of the worst excesses. So it is that the chroniclers who recounted the capture of Jerusalem by the Crusaders found nothing out of the ordinary in the massacres which besmirched this victory. During the Wars of Religion and the Thirty Years War, appalling crimes (recorded in terrifying detail in the engravings of Jacques Callot) were committed throughout the length and breadth of Europe, yet theologians on either side hastened to justify them in the name of the Gospel. However, the horrors of centuries past were as nothing compared with the massacres and crimes committed in the ideological crusades of the twentieth century — the Russian Civil War, the Spanish Civil War and the Second World War.

The fathers of international law contributed decisively to the adoption of rules designed to contain the violence of war. By rooting these rules in positive law that is, in the practice and will of sovereigns and States - they opened the way to the recognition of rules of universal scope, capable of transcending the divisions between cultures and religions.

What are the Basic Concepts of IHL?

Although Grotius (1583-1645) remained attached to the scholastic doctrine of just war, he laid the foundations of an international law based on positive law, thus preparing the ground for the adoption of the laws and customs of war which remain in force to this day\(^6\). However, the credit for being the first to call into question, if not the doctrine of just war, at least the conclusions which were commonly drawn from it, must go to Vattel (1714-1767): “War cannot be just on both sides. One party claims a right, the other disputes the justice of the claim; one complains of an injury, the other denies having done it. When two persons dispute over the truth of a proposition it is impossible that the two contrary opinions should be at the same time true. However, it can happen that the contending parties are both in good faith; and in a doubtful cause it is, moreover, uncertain which side is in the right. Since, therefore, Nations are equal and independent, and cannot set themselves up as judges over one another, it follows that in all cases open to doubt the war carried on by both parties must be regarded, as equally lawful, at least as regards its exterior effects and until the cause is decided.”

Thus Vattel does not openly attack the doctrine of just war, as he acknowledges that war cannot be just on both sides. What he does is to put the doctrine into perspective and draw its sting. As States are sovereign and cannot be judged without their consent, he concludes that it is rarely possible to decide which of the two belligerents is defending a just cause. Each of them may, in good faith, be persuaded that it is doing so. Hence, each may have the same right of recourse to arms. Furthermore, Vattel is ready to grant this margin of uncertainty and the resulting presumption of good faith to both sides, even in the case of civil war — a position which clearly runs counter to the custom of his time.

It is in large measure out of this margin of uncertainty and tolerance that the laws and customs of war were to develop. The emergence of nation States in the Europe of the seventeenth and eighteenth centuries radically changed people’s conception of war and the fate allotted to its victims. War was no longer perceived as the means of ensuring the triumph of a dogma, a truth or a religion but rather as a means — and a highly imperfect one at that — of settling a dispute between two sovereigns who recognized no common judge. The emergence of nation States also permitted the adoption of rules designed to restrain the scourge of war. Warfare was seen as the prerogative of kings. States fought through the intermediary of their armed forces, easily recognizable by their colourful uniforms. Civilians who took no part in the fighting and combatants who were wounded or who surrendered were to be spared. Similarly, States agreed not to make use of treacherous methods and to prohibit certain weapons, such as dum-dum bullets and poisoned weapons, designed to cause unspeakable suffering out of all proportion to the only legitimate aim that can be admitted in war, namely to weaken the military forces of the enemy. These rules were gradually codified, particularly in the Geneva Conventions of 1864, 1906, 1929 and 1949, and in the 1868 Declaration of St Petersburg and the Hague Conventions of 1899 and 1907. Generally speaking, two principal means of curbing the violence of war are recognized:

- rules relating to the conduct of hostilities, which govern the methods and means of warfare and which prohibit indiscriminate attacks, attacks directed against non-combatants, weapons of a nature to cause suffering disproportionate to the object of the war and perfidy;

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...rules intended to protect non-combatants and persons placed *hors de combat*: wounded, sick and shipwrecked members of armed forces, prisoners of war, army medical personnel and the civilian population. It will be noted that these two bodies of rules are interdependent and complementary. Certain rules are common to both. For example, the rules which restrict aerial bombardment and prohibit indiscriminate bombing fall within the law governing the conduct of hostilities if seen from the viewpoint of the aircrew, and within the law protecting the civilian population if seen from the viewpoint of the effects of air raids on the ground. These two bodies of law were merged in the Protocols additional to the Geneva Conventions of 8 June 1977, which updated both the provisions relating to the conduct of hostilities and those relating to the protection of war victims.

5.6.1 IHL and the Prohibition of Recourse to War

Most of the rules of humanitarian law were adopted at a time when recourse to war was legal. War was an attribute of sovereignty and was lawful when waged on the orders of the ruler. A State that went to war was the sole judge of the reasons which led it to take up arms. This was the legal opinion of States and the predominant view of legal doctrine before the French Revolution and in the nineteenth century. In all recent conflicts, one or other of the belligerents — and, more often than not, both of them — have declared that they were only exercising their right of self-defence in repelling an aggression of which they themselves or their allies were the victims. Voices have been raised to affirm that they are therefore freed from the obligations stemming from the laws and customs of war and that the victim of an aggression is not bound to observe the rules vis-à-vis its aggressor. Certain authors, particularly in the United States and the former Soviet Union, tried to mould this claim into a legal theory by proposing to subordinate the application of *jus in bello* to *jus ad bellum*. In that case, two solutions can be envisaged:

- either a war of aggression is deemed to be an unlawful act — the international crime *par excellence* — that cannot be regulated, in which case it has to be accepted that, in the event of aggression, the laws and customs of war do not apply to either of the belligerents;

- or the sole effect of the unlawfulness of the use of force is to deprive the aggressor State of the rights conferred by *jus in bello*, whereas all the aggressor’s obligations under this law remain unchanged. This results in a differentiated application of the laws and customs of war, the aggressor State remaining subject to all the obligations incumbent on it as a belligerent, while the State which is the victim of the aggression is freed of any obligation vis-à-vis its enemy.

5.6.2 The Setting Aside of IHL in the Event of a War of Aggression

While the first hypothesis is the only one that draws all the logical conclusions of any subordination of *jus in bello* to *jus ad bellum*, it must still be rejected out of hand. Whether at national or international level, the fact is that one purpose of the law is to regulate situations resulting from unlawful acts. Furthermore, since there can be no war under the system laid down in the United Nations Charter, save in response to an aggression, it would have to be admitted that States had drawn up rules lacking any field of application, and that would be absurd. Finally, this hypothesis opens the way to utter lawlessness and to a degree of savagery beside which the horrors of...
earlier wars pale into insignificance. The consequence of an abdication of the rule of law, the first hypothesis would produce absurd and monstrous results.

According to Grotius the party waging the 'just war' i.e., with God behind it was not so bound. Grotius, by secularising the idea of the just war, removed in part that formidable obstacle. He urges that irrespective of the 'justness' or otherwise of the war, the law of war bound the 'just' and the 'unjust' belligerent equally.

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**5.7 SUMMARY**

- In this unit, we discussed the meaning of the International Humanitarian Law (IHL) and application of the IHL that is it addresses the reality of a conflict without considering the reasons for or legality of resorting to force. It regulates only those aspects of the conflict which are humanitarian concern.
- We further discussed the law of armed conflict when does it starts and how can we recognize it. We discussed it with the special reference to the case laws. We also discussed the concept of self defense under Article 51 of the UN charter and the concept of 'just war' in the historical period to the contemporary period.

**5.8 TERMINAL QUESTIONS**

1) Which Law is applicable during the Armed Conflict?

2) Can a state use the right to self- defence under article 51 of the UN charter without declaring a status of armed conflict in its state?

3) Discuss the concept of 'just war'.

**5.9 ANSWERS AND HINTS**

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5.10 REFERENCES AND SUGGESTED READINGS


